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# ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE AND CONSUMER PROTECTION: THE REFUSAL TO EXPERIMENT

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## INTRODUCTION

Controversy has surrounded many of the principles and doctrines of the Uniform Commercial Code<sup>1</sup> (the “Code”) for more than four decades.<sup>2</sup> One criticism, which emerged in the 1960s, was that the Code was indifferent to economic hardships suffered by consumers<sup>3</sup> in the marketplace.<sup>4</sup> This indifference

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<sup>1</sup> The Code has been enacted in all fifty states as well as Puerto Rico, the District of Columbia, and the U.S. Virgin Islands. Louisiana and Puerto Rico have enacted only parts of the Code. The Code was a joint project of the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”). Work began in 1942 and continued for more than a decade.

The focus of this article is Article 2 (Sales). Proposed amendments to Article 2 were approved by the NCCUSL in 2002 and by the ALI in 2003. The text of these proposed amendments and the preliminary official comments are available at <http://www.nccusl.org>. Unless otherwise indicated, citations are to existing Article 2, and to Revised Article 1, approved by the sponsoring organizations in 2001.

<sup>2</sup> Examples include section 2-207, U.C.C. § 2-207 (2003), on the battle of forms and section 2-302, *id.* § 2-302, which recognizes the doctrine of unconscionability. See generally Daniel Keating, *Exploring the Battle of Forms in Action*, 98 MICH. L. REV. 2678 (2000) (discussing the difficulties courts have encountered in applying section 2-207); Carol B. Swanson, *Unconscionable Quandary: UCC Article 2 and the Unconscionability Doctrine*, 31 N.M. L. REV. 359, 386–87 (2001) (summarizing the controversy that surrounds the doctrine of unconscionability).

<sup>3</sup> Proposed U.C.C. § 2-103(1)(c) defines “consumer” as “an individual who buys . . . goods that at the time of contracting are intended by the individual to be used for personal, family, or household purposes.” U.C.C. § 2-103(1)(c) (Draft for Approval 2001) [hereinafter proposed U.C.C.] (“consumer” is currently defined in U.C.C. § 1-201(b)(1)).

<sup>4</sup> During the 1960s, Article 3’s holder-in-due-course doctrine that protected transferees of promissory notes from consumer claims and defenses generated extensive criticism. See, e.g., Albert J. Rosenthal, *Negotiability—Who Needs It?*, 71

triggered demands for consumer protection laws and, in the 1970s, Congress and state legislatures enacted reform measures designed to curb abuses in transactions that fall within the scope of the Code.<sup>5</sup>

Although protection laws multiplied in number, some scholars claimed that fundamental fairness in contract<sup>6</sup> relationships between consumers and merchants<sup>7</sup> had not been

COLUM. L. REV. 375, 375-77 (1971). Courts, legislatures, and, finally, the Federal Trade Commission took action to prevent use of the doctrine in consumer installment goods and service transactions. See E. ALLAN FARNSWORTH, *CONTRACTS*, § 11.8 (3d ed. 1999) (discussing the doctrine and efforts to protect consumers); see also U.C.C. § 3-302(g) (providing that Article 3 is subordinate to any law which limits "status as a holder in due course in particular classes of transactions").

<sup>5</sup> See STATE UCC VARIATIONS (P & F eds., West 1998) (1965). A small number of states, including Maine, see *id.* § 2-316, Connecticut, see *id.* § 42a-2-316, and Maryland, see *id.* § 2-316.1, ban clauses that disclaim implied warranties or limit remedies for breach of these warranties in consumer contracts for the sale of goods. All states and the District of Columbia have enacted "lemon laws" to supplement Article 2 in response to consumer complaints that automobile dealers did not repair defects in new cars. See Joan Vogel, *Squeezing Consumers: Lemon Laws, Consumer Warranties, and a Proposal For Reform*, 1985 ARIZ. ST. L.J. 589, 615-44 (1985) (criticizing these laws).

In 1975, Congress enacted the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act to eliminate confusion over what warranties manufacturers and sellers give on their products. See 15 U.S.C. §§ 2301-2312 (2000); see also Kathleen F. Brickey, *The Magnuson-Moss Act—An Analysis of the Efficacy of Federal Warranty Regulation as a Consumer Protection Tool*, 18 SANTA CLARA L. REV. 73, 73-77 (1978) (discussing the consumer complaints that prompted Congress to take action). See generally JONATHAN SHELDON & CAROLYN L. CARTER, *CONSUMER WARRANTY LAW* (2d ed. 2001) (evaluating all state and federal consumer warranty legislation); Donald F. Clifford, Jr., *Non-UCC Statutory Provisions Affecting Warranty Disclaimers and Remedies in Sales of Goods*, 71 N.C. L. REV. 1011 (1993) (same).

<sup>6</sup> Proposed U.C.C. § 2-103(1)(d) defines "consumer contract" as "a contract between a merchant seller and a consumer." Proposed U.C.C. § 2-103(1)(d). Currently, "consumer contract" is not defined by the U.C.C., whereas "contract" is defined in U.C.C. § 1-201(b)(12).

<sup>7</sup> U.C.C. § 2-104(1) provides:

"Merchant" means a person who deals in goods of the kind or otherwise . . . holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who holds himself out [by occupation] as having such knowledge or skill.

U.C.C. § 2-104(1).

Although this article is limited to a discussion of consumer issues, small businesses have also claimed that they lack equal bargaining power, knowledge, and sophistication in transactions with powerful merchants and are in need of protection. See, e.g., Richard J. Hunter Jr., *Unconscionability Revisited: A*

achieved.<sup>8</sup> Existing consumer laws were limited in coverage,<sup>9</sup> and injustices not captured by these laws continued to flourish in the marketplace.<sup>10</sup> During the 1980s, commentators warned that the economic welfare of consumers would continue to deteriorate unless more innovative solutions to consumer grievances were developed and implemented in every state.<sup>11</sup> At

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*Comparative Approach*, 68 N.D. L. REV. 145, 150 (1992); Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1074-84 (1986); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 481-82 (1995); G. Richard Shell, *Substituting Ethical Standards for Common Law Rules in Commercial Cases: An Emerging Statutory Trend*, 82 NW. U. L. REV. 1198, 1199 (1988); William J. Woodward, "Sale" of Law and Forum and the Widening Gulf Between "Consumer" and "Nonconsumer" Contracts in the UCC, 75 WASH. U. L.Q. 243, 244-46 (1997).

<sup>8</sup> See generally Lary Lawrence, *Toward A More Efficient and Just Economy: An Argument for Limited Enforcement of Consumer Promises*, 48 OHIO ST. L.J. 815 (1987).

<sup>9</sup> State lemon laws apply, with only limited exceptions, to new motor vehicles. See SHELTON & CARTER, *supra* note 5, § 13.2.3.

<sup>10</sup> See Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990 Preliminary Report of the Uniform Commercial Code Article 2 Study Group*, 16 DEL. J. CORP. L. 981, 1003 (1991) [hereinafter Task Force of the A.B.A.] ("There is not available a viable package of non-U.C.C. law to resolve consumer sales law problems.").

<sup>11</sup> Commentators have focused on the use of standard form contracts in consumer transactions. Some have claimed that certain clauses contained in these contracts favor the drafter. See, e.g., Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 UCC L.J. 115, 118-19 (1999) (listing typical standard form provisions that may be unfair to consumers); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 495 (2002) (observing that "the electronic environment gives businesses new opportunities to exploit consumers"); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 356-57 (1970) (arguing for limits on or preclusion of certain standard contract clauses); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1275 (1983) (explaining the means by which drafters of standard contracts seek to avoid legal obligations); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) ("Forms standardized to achieve economies of mass production and mass merchandising will also, under the present system, almost certainly be unfair, because if they were not, their issuers would probably lose money."). Other writers have insisted that standard forms are beneficial. See, e.g., Douglas G. Baird, *Commercial Norms and the Fine Art of the Small Con: Comments on Daniel Keating's 'Exploring the Battle of Forms in Action'*, 98 MICH. L. REV. 2716, 2724 (2000) (arguing consumers may benefit from a market devoid of bargaining); John J. A. Burke, *Contract As Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290-91 (2000) ("These contracts are neither good nor bad, and neither just nor unjust, for they are necessary and . . . beneficial.").

the same time, the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) recommended that existing articles of the Code be revised and new articles be created.<sup>12</sup> This recommendation was prompted by two concerns.<sup>13</sup> First, some Code sections were ambiguous and conflicting judicial interpretations had emerged. These interpretations undermined the Code's objective to provide uniform principles and standards to govern commercial transactions in this country.<sup>14</sup> Second, state legislatures enacted the Code before the consumer movement was organized and before technology and new methods of doing business dominated the marketplace.<sup>15</sup> The Code was in danger of becoming hopelessly outdated unless principles were established to accommodate these developments.

Consumer advocates greeted the recommendation with enthusiasm.<sup>16</sup> The Code had not been completely updated since

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<sup>12</sup> The process began in 1987 with the approval of a new article, Article 2A (Leases). New Article 4A (Funds Transfers) was completed in 1989. Since that time revisions or amendments have been made to every article in the Code. See Fred H. Miller, *Modernizing the UCC for the New Millennium: Introduction to a Collection on the New UCC*, 25 OKLA. CITY U. L. REV. 189, 195-202 (2000) (outlining these efforts). Information on adoption of revised or amended articles is available at <http://www.nccusl.org>.

<sup>13</sup> See Gerald T. McLaughlin, *The Evolving Uniform Commercial Code: From Infancy to Maturity to Old Age*, 26 LOY. L.A. L. REV. 691, 693 (1993) (explaining varying state interpretations of ambiguous terms); Fred H. Miller, *Is Karl's Code Kaput?*, 26 LOY. L.A. L. REV. 703, 706-07 (1993) (listing the reasons why Code articles were in need of revision).

<sup>14</sup> U.C.C. § 1-103(a)(3) provides that one of the purposes of the Code is "to make uniform the law among the various jurisdictions." U.C.C. § 1-103(a)(3).

Professor Miller stated: "The Uniform Commercial Code is simply too important to the economy of the country and to the perpetuation of the federal system to permit significant nonuniformity through amendments, or through the failure to enact the revisions." Fred H. Miller, *Consumers and the Code: The Search for the Proper Formula*, 75 WASH. U. L.Q. 187, 214 (1997).

<sup>15</sup> In 1993, Professor Miller identified technological developments to include electronic funds transfers, electronic data interchange, and automated check processing. New methods of doing business included leasing of goods and the issuance of variable rate notes. Miller, *supra* note 13, at 707. Software contracts and licenses of information were in their infancy and scholars had only begun to examine the desirability of including these transactions within the scope of Article 2. See Raymond T. Nimmer, *Intangibles Contracts: Thoughts of Hubs, Spokes, and Reinvigorating Article 2*, 35 WM. & MARY L. REV. 1337, 1342-43 (1994).

<sup>16</sup> See Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations From the Revision of the UCC*, 39 S. TEX. L. REV. 707, 727 (1998) (stating that "[c]ode amendments had to better accommodate consumer interests for both fairness and enactability reasons"); see also Task Force of the A.B.A., *supra* note 10, at 1000-

it was enacted into law by state legislatures in the early 1960s.<sup>17</sup> Consumers believed that the uniform law process offered an ideal opportunity to persuade members of the sponsoring organizations that more comprehensive special consumer provisions were necessary and desirable additions to Code articles.<sup>18</sup> Article 2 (Sales), described as “[t]he heart of the Code,”<sup>19</sup> became the rallying point for consumer groups. They claimed that the Article’s provisions, which rest on the doctrine of freedom of contract, enabled skilled and powerful sellers to perpetrate injustices upon unsuspecting consumers burdened with goods which failed to meet their reasonable expectations.<sup>20</sup>

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09 (recommending that Article 2 address a number of consumer issues, including disclaimers of the implied warranties of merchantability and fitness for a particular purpose and standard form contracts). Articles 4A (Funds Transfers), 6 (Bulk Sales), 7 (Documents of Title) and 8 (Investment Securities) do not raise issues of special significance to consumers. See Miller, *supra* note 12, at 199–200.

<sup>17</sup> See Miller, *supra* note 14, at 193 (“This revision effort is widespread and not limited as were the completed 1970s revisions to Articles 9 and 8. For that reason, the question of the role, if any, for special consumer provisions in the Code has arisen in this new effort for the first time since the late 1940s.”).

<sup>18</sup> Special consumer provisions are expressly applicable to contracts between merchants and consumers and are usually nonvariable by agreement between the parties. Most of current Article 2’s provisions apply to all buyers or sellers and make no distinction between consumer and non-consumer contracts. See *infra* notes 169–73 and accompanying text.

The only express treatments of consumer matters in the original version of Article 2 include the provisions providing for third party beneficiaries of warranties, U.C.C. § 2-318, and making limitations on consequential damages for personal injuries prima facie unconscionable in the case of consumer goods, *id.* § 2-719(3). In 1999, additional measures were added. See, e.g., *id.* §§ 2-502(1)(a) (providing the circumstances under which a consumer buyer may recover goods from a seller who is insolvent), 2-716(3) (stating that in the case of consumer goods, a buyer’s right to replevin vests upon the acquisition of a special property). A number of sections in current Article 2 are intended to benefit all buyers, including consumers. See, e.g., *id.* §§ 2-314(1) (providing that the serving of food or drink for value creates an implied warranty of merchantability), 2-316(2)–(3) (establishing requirements to effectively disclaim the implied warranty of merchantability and the implied warranty of fitness for a particular purpose), 2-719(2) (providing that if a limited remedy fails of its essential purpose, Article 2 remedies are available); see also *id.* §§ 2-607 cmt. 4, 2-608 cmt. 5 (stating that certain requirements with respect to notice are less stringent for non-merchants), 2-719 cmt. 1 (stating that “minimum adequate remedies [must] be available” in sales contracts).

<sup>19</sup> Karl N. Llewellyn, *Why We Need the Uniform Commercial Code*, 10 FLA. L. REV. 367, 378 (1957).

<sup>20</sup> Yvonne W. Rosmarin, *Consumers-R-Us: A Reality In The U.C.C. Article 2 Revision Process*, 35 WM. & MARY L. REV. 1593, 1596 n.11 (1993) (“The fact that the underlying assumptions upon which the current Article 2 is based do not adequately serve in the area of consumer transactions, the realities of modern commerce, and the Code’s notion of fairness are sufficient ‘criteria’ for changing the Code.”). See

They also charged that the Article's reliance upon the private lawsuit to provide relief to aggrieved buyers was unfair to many consumers who had neither the time nor the financial resources to initiate litigation.<sup>21</sup> During the 1990s, proposals were developed to address a variety of important issues, including standard form contracts, disclaimers of implied warranties, and efficient and affordable enforcement procedures.<sup>22</sup>

After more than a decade of work by two successive drafting committees, amendments to Article 2 have been approved by the sponsoring organizations and will be presented to state legislatures for adoption.<sup>23</sup> It is evident, however, that consumers have achieved only modest victories<sup>24</sup> and that Article

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generally Gail Hillebrand, *The Uniform Commercial Code Drafting Process: Will Articles 2, 2B, and 9 Be Fair To Consumers?*, 75 WASH. U. L.Q. 69 (1997) (outlining consumer proposals under consideration for Articles 2, 2B and 9 and discussing revised Articles 3 and 4).

<sup>21</sup> See, e.g., Edward L. Rubin, *The Code, The Consumer, and the Institutional Structure of the Common Law*, 75 WASH. U. L.Q. 11, 43-68 (1997) (criticizing Article 2's reliance upon privately initiated litigation to provide redress for grievances and suggesting measures for reform, including government run product testing centers and public enforcement of consumer claims).

A number of commentators recommended that Article 2 provide attorney's fees and costs to consumers who prevail against sellers. See, e.g., Miller, *supra* note 14, at 216-17 (asserting that both consumers and creditors should support attorney's fees provisions); Rosmarin, *supra* note 20, at 1615-16 (arguing that attorney's fees act as a deterrent).

<sup>22</sup> See, e.g., John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1491-98 (1994) (suggesting changes to current Article 2 sections to benefit consumers); Rosmarin, *supra* note 20, at 1606-33 (discussing proposals for reform). But warnings were issued early in the uniform law process that tension between interest groups might become an obstacle to the incorporation of special consumer provisions. See, e.g., Robert A. Hillman, *Standards for Revising Article 2 of the U.C.C.: The NOM Clause Model*, 35 WM. & MARY L. REV. 1509, 1520-21 (1994) (stating that Congress provides a better forum to address consumer issues because consensus is difficult to achieve in the uniform law process).

<sup>23</sup> Approval of amendments by the sponsoring organizations does not ensure uniform enactment by the states. See Marion W. Benfield, Jr. & Peter A. Alces, *Reinventing The Wheel*, 35 WM. & MARY L. REV. 1405, 1433-34 (1994) (outlining the difficulties encountered in securing uniform and timely adoption of new articles and amendments to existing articles); see also Robert E. Scott, *The Rise and Fall of Article 2*, 62 LA. L. REV. 1009, 1009-13, 1047-53 (2002) (providing a brief history of the Article 2 uniform law process from 1992 to 2002).

<sup>24</sup> See proposed U.C.C. §§ 2-103(1)(c) (providing a definition of "consumer"), 2-103(1)(d) (defining "consumer contract"), 2-108(1)(b) (subordinating Article 2 to any statute, administrative rule or final court decision which creates a different rule for consumers), 2-316(2) (amending the requirements to effectively disclaim implied warranties to provide that to disclaim the implied warranty of merchantability in a

2 will continue to be one of the most important bodies of law to vigorously apply the principle of government restraint for the purpose of preserving freedom of contract.<sup>25</sup> Some commentators have suggested that the incorporation of only a small number of special consumer provisions was necessary to ensure approval of the amendments by the ALI and the NCCUSL and uniform enactment by the states.<sup>26</sup> Other writers have concluded that the uniform law process did not diffuse the tension between consumers and commercial interests and that this tension created an insurmountable obstacle to substantive changes in Article 2's provisions.<sup>27</sup>

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consumer contract "the language must be in a record, be conspicuous, and state 'The seller undertakes no responsibility for the quality of the goods except as otherwise provided in this contract'" and to exclude the implied warranty of fitness for a particular purpose in a consumer contract, the contract must state "[t]he seller assumes no responsibility that the goods will be fit for any particular purpose for which you may be buying these goods, except as otherwise provided in the contract"), 2-316(3)(a) (requiring that expressions such as "as is," to exclude implied warranties in a consumer contract evidenced by a record, be set forth conspicuously in the record), 2-508(1)-(2) (eliminating the seller's right to cure in a consumer contract following a justifiable revocation of acceptance), 2-718(1) (retaining the requirements that a party seeking to enforce a liquidated damage clause in a consumer contract to establish the difficulties of proof of loss and the inconvenience or nonfeasibility of obtaining an adequate remedy), 2-725(1) (stating that the applicable statute of limitations period cannot be reduced in a consumer contract).

Several new provisions benefit all buyers, including consumers. *See, e.g., id.* §§ 2-103(1)(m) (defining a "remedial promise" as "a promise by the seller to repair or replace the goods or to refund all or part of the price of the goods upon the happening of a specified event"), 2-313A (providing that obligations created by a record packaged with or accompanying new goods extend from sellers to remote purchasers), 2-313A cmt. 1 (stating that the term "obligation" is used rather than "warranty" because no contract exists between the seller and the remote purchaser and because the obligation does not arise as part of the basis of the bargain as provided in section 2-313), 2-313B (providing that obligations created by advertising or similar communications to the public extend from sellers to remote purchasers).

<sup>25</sup> However, some commentators are not optimistic that Article 2 will continue to play a vital role in commercial sales transactions. *See* Gregory E. Maggs, *The Waning Importance of Revisions to UCC Article 2*, 78 NOTRE DAME L. REV. 595, 596, 617-21 (2003) (stating that Article 2 governs contracts worth trillions of dollars, but concluding that the importance of the Article is diminished by the decision of the sponsoring organizations to address computer information contracts outside of the Article); Scott, *supra* note 23, at 1010 (stating that the failure of the ALI and the NCCUSL to reach consensus on important substantive issues means that Article 2 "will inevitably become less relevant to the legal regulation of commercial sales transactions").

<sup>26</sup> *See* Miller, *supra* note 14, at 214 (observing that "there is consensus among the participants in the revision process that the standard should be the ultimate enactability of the statute in fundamentally uniform form").

<sup>27</sup> *See generally* William E. Crawford, *Essays in Honor of William D. Hawkland*:



The lessons to be learned, though, are not limited to why uniform enactment is essential to the viability of a commercial code or to an examination of how the uniform law process molded the final products. By the early 1980s, debate over the wisdom of consumer measures had emerged.<sup>28</sup> Skeptics charged that regulatory laws, which restrict freedom of contract, are neither necessary to protect the interests of most consumers nor desirable because they impose adverse consequences upon those they are intended to benefit as well as upon the community as a whole.<sup>29</sup> The controversy prompted Fred Miller, who served as Executive Director of the NCCUSL during the uniform law process, to demand that documentation be supplied to establish both the need for and desirability of consumer proposals.<sup>30</sup> The impact of the demand was immediate. Consumer advocates could not provide data to establish the wisdom of every proposal and, as a result, only a relatively few measures were deemed worthy of consideration by the leadership of the Conference.<sup>31</sup> The purpose of this article is to explore the reasons why consumer protection laws are controversial and to suggest how this controversy frustrated efforts to address a number of important consumer issues in Article 2.

Part I outlines the vision of the marketplace created by classical contract theory. According to this vision, the exercise of freedom of contract between parties of equal bargaining power, knowledge, and skill provides the vehicle to facilitate the orderly exchange of goods and services in markets of perfect competition and to achieve liberty and fairness in the marketplace.<sup>32</sup> Despite its unworldliness, this theory has provided the standard model of analysis for courts, legislatures, and contract scholars since the

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*Unifying Commercial Law in the 20<sup>th</sup> Century: Understanding the Impulse and Assessing the Effort*, 62 LA. L. REV. 991 (2002) (evaluating the uniform law process, with emphasis on the role played by industry and consumers).

<sup>28</sup> See, e.g., Lawrence, *supra* note 8, at 815; *supra* notes 2–12 and accompanying text.

<sup>29</sup> See *infra* notes 203–06 and accompanying text.

<sup>30</sup> See generally Miller, *supra* note 14.

<sup>31</sup> *Id.* at 210–13 (offering reasons why Article 2 should not incorporate a significant number of new special consumer provisions); see also Greenfield & Rusch, *supra* note 11, at 144 (stating that the absence of empirical evidence on the effectiveness of the doctrine of unconscionability to protect consumers from unfair contract terms “stymies attempts to reach a workable solution as neither side acknowledges the validity of the other side’s world view”).

<sup>32</sup> See *infra* notes 51–56 and accompanying text.

late 1800s. Deviations from the theory's vision of parties as equals have been used to justify limitations upon freedom of contract to protect the health, safety, and economic welfare of both the American worker and the consumer.<sup>33</sup>

Part II explores the gap exposed during the nineteenth century between classical theory's vision of the marketplace and contract practices of American industrialists. Market realities revealed that powerful capitalists exploited men, women, and children who labored in steel mills, factories, and underground mines.<sup>34</sup> Legislatures could not resist public outcry for measures to remedy workers' grievances and, by 1920, many states enacted laws to eradicate the evils inflicted by employers upon their employees.<sup>35</sup>

Labor's struggle for justice in the workplace marked the beginning of comprehensive legislative efforts to maintain the vigor of the institution of contract in an imperfect world where markets seldom mirror the ideal. However, scholars warned that government regulations designed to protect individual welfare may impose benefits as well as burdens upon those who fall within the laws as well as upon others, and that such consequences cannot always be identified and measured with certainty at the time legislatures choose to act. They cautioned that legislative enactments to ensure fundamental fairness between contracting parties are experiments whose wisdom is determined only over the course of time.<sup>36</sup> The debate over the merits of legislative measures to protect those who are less powerful and skilled had emerged.

During the 1930s, inequality of bargaining power was found to exist in markets for goods and services, prompting concern

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<sup>33</sup> See generally Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365 (1921) (discussing the limitations imposed upon freedom of contract during the early decades of the twentieth century because equal bargaining power did not exist in the marketplace). In recent years, some writers have questioned the usefulness of the doctrine of inequality of bargaining power to determine the need for government restraints upon freedom of contract. See, e.g., Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1155-56 (1976).

<sup>34</sup> See RICHARD O. BOYER & HERBERT M. MORAIS, *LABOR'S UNTOLD STORY* (3d ed. 1994) (1955) (providing an exhaustive, but colorful, description of the labor movement during the late 1800s and early 1900s).

<sup>35</sup> *Id.* at 180.

<sup>36</sup> See, e.g., Learned Hand, *Due Process of Law and The Eight-Hour Day*, 21 HARV. L. REV. 495, 506-09 (1908).

that merchants could exploit consumers.<sup>37</sup> It was against this background that work began on a uniform set of principles and standards to govern commercial transactions in this country. Part III explores the vision of the marketplace created in the 1940s by the drafters of Article 2. The question of whether and to what extent government regulation of sales transactions was necessary dominated the drafting process. In the end, the drafters decided that the doctrine of freedom of contract, which demands the enforcement of bargains as made, should provide the foundation for Article 2's vision of the marketplace.<sup>38</sup> However, Article 2 acknowledges that disparity of bargaining power exists in the marketplace and that freedom of contract must be limited in the interests of fairness, at least in extraordinary circumstances. The doctrine of unconscionability, which is granted express recognition in section 2-302,<sup>39</sup> is the only sweeping exception contained in the Article to the notion that parties may contract upon such terms as they might choose.<sup>40</sup>

Part IV discusses the plight of the consumer during the 1960s and 1970s. Markets were characterized by unequal bargaining power and imperfect information.<sup>41</sup> The gap between contract theory and contract practice had grown. Many scholars concluded that because the economic welfare of all consumers was at risk, regulatory measures to address the consumers' plight were necessary.<sup>42</sup> By the late 1960s, the consumer

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<sup>37</sup> See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (stating that form contracts enable "powerful industrial and commercial overlords . . . to impose a new feudal order of their own making upon a vast host of vassals").

<sup>38</sup> See *infra* notes 124–134 and accompanying text.

<sup>39</sup> U.C.C. § 2-302(1) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

U.C.C. § 2-302(1) (2003).

<sup>40</sup> See *infra* notes 152–68 and accompanying text.

<sup>41</sup> See generally Symposium, *Consumer Protection*, 64 MICH. L. REV. 1197 (1966) (discussing consumer issues identified in the 1960s, with special emphasis on the lack of information available to consumers about the quality and prices of goods and services).

<sup>42</sup> See, e.g., Richard J. Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203, 1221–26 (1966).

movement was organized, triggered by widespread complaints about defective merchandise, unfinished services, and fraud in credit transactions.<sup>43</sup> Congress and state legislatures responded to the public's demand for laws to prevent abuses in goods and service transactions. However, within a decade after the consumer movement gained momentum, skeptics began to challenge the wisdom of these laws. Although many of these challenges were unproven, they prompted intense debate over the merits of government regulation and freedom of contract and undermined confidence that reasonable experimentation by legislatures ensures fairness without hampering market efficiency.<sup>44</sup>

Finally, Part V reviews the efforts made in the 1990s to incorporate special consumer provisions into Article 2 and outlines the role that the decision of the NCCUSL leadership to discourage experimentation played in preserving the doctrine of freedom of contract.

## I. NINETEENTH CENTURY CLASSICAL CONTRACT THEORY AND THE COMMON LAW TRADITION

### A. *Contract Theory and the Doctrine of Freedom of Contract*

Classical contract theory, which emerged in the decades following the Civil War, had its roots in the political and economic philosophies that prevailed in America during the eighteenth and nineteenth centuries.<sup>45</sup> Political philosophy

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<sup>43</sup> See Homer Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 2–10 (1969) (describing the movement and its culmination with the passage of federal consumer credit legislation and the American Bar Association's proposal for state action).

<sup>44</sup> See *infra* notes 203–09 and accompanying text.

<sup>45</sup> For an analysis of the economic and political theories that provide the foundation for nineteenth century classical contract theory, see Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 558–65 (1933).

Contract theorists agree that the institution of contract developed to meet the need of the marketplace for a mechanism to facilitate the efficient exchange of goods and services. Professor Kessler has observed:

With the development of a free enterprise system based on an unheard of division of labor, capitalistic society needed a highly elastic legal institution to safeguard the exchange of goods and services on the market. Common law lawyers, responding to this social need, transformed "contract" from the clumsy institution that it was in the sixteenth century into a tool of almost unlimited usefulness and pliability. Contract thus became the indispensable instrument of the enterpriser, enabling him to

rested upon the proposition that "the end of man was freedom."<sup>46</sup> "Liberty, the first of blessings, the aspiration of every human soul, is the supreme object. Every abridgment of it demands an excuse, and the only good excuse is the necessity of preserving it. Whatever tends to preserve this is right, all else is wrong."<sup>47</sup> Accordingly, the function of law was to protect and preserve individual liberty from social controls.<sup>48</sup> Economic theory incorporated the doctrine of laissez-faire whereby the pursuit of private self-interest in markets of perfect competition maximized the good of society as a whole. According to Adam Smith, people were guided in the marketplace by an "invisible hand."<sup>49</sup> "By pursuing his own interest [the individual member of society] frequently promotes that of the society more effectually than when he really intends to promote it."<sup>50</sup>

Nineteenth century classical contract theory tailored these concepts to provide the fundamental components for its vision of the marketplace. At the center of this vision is the freedom of

go about his affairs in a rational way. Rational behavior within the context of our culture is only possible if agreements will be respected.

Kessler, *supra* note 37, at 629.

<sup>46</sup> Roscoe Pound, *The End of Law as Developed in Juristic Thought II*, 30 HARV. L. REV. 201, 204 (1917).

<sup>47</sup> JAMES C. CARTER, LAW: ITS ORIGIN GROWTH AND FUNCTION 337 (Da Capo Press 1974) (1907).

<sup>48</sup> One nineteenth century scholar wrote:

Every rule of law in itself is an evil, for it can only have for its object the regulation of the exercise of rights, and to regulate the exercise of a right is inevitably to limit it. On the other hand every rule of law which sanctions a right, which preserves it from an infringement, which protects it from a peril is good because in this way it responds to its legitimate end. Thus if law is an evil, it is a necessary evil.

Pound, *supra* note 46, at 205 n.16 (quoting CHARLES BEUDANT, LE DROIT INDIVIDUEL ET L'ETAT 148 (1891)).

<sup>49</sup> See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (Edward Cannan ed., 1937).

<sup>50</sup> *Id.* Richard Barber has described the optimistic view of nineteenth century economists:

The designers of the classical model reasoned that there would be optimal allocation of resources if markets were competitively structured, if buyers and sellers possessed adequate information about prices and the availability of goods, and if sales were made without artificial restrictions of any form. . . . If all of these conditions are present, so the theory goes, utilities are maximized, and the society secures the fullest possible benefit out of its resources. In effect, a perfect balance is struck; producers (sellers) and consumers (buyers) are on an equal footing, and neither group will be able to take advantage of the other.

Barber, *supra* note 42, at 1222.

contract doctrine.<sup>51</sup> Classical theory defines freedom of contract as the power of parties to decide whether to contract and to determine the rights and obligations of their bargain.<sup>52</sup> According to this vision, obligations arise out of the exercise of free will and a “meeting of minds.”<sup>53</sup> Freedom of contract between parties of equal bargaining power, skill, and knowledge preserves and enhances individual welfare. The exercise of this freedom allows each party to express liberty and responsibility in the marketplace and to maximize his expected utility. It ensures fundamental fairness in contract because informed, uncoerced consent to each term of the bargain is given by the parties.<sup>54</sup> The bargain contract, formed between equal parties, also meets the demand of the marketplace for a vehicle to facilitate the orderly

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<sup>51</sup> See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 455 (1909) (noting that the first exhaustive treatment of freedom of contract as a fundamental natural right did not appear until the early 1890s). Professor Friedman has defined the relationship between contract law and economic theory as follows:

The correspondence between law and economic theory was never exact. Contract law was not a book written by Adam Smith. Nobody purposely sat down to turn contract law into an applied branch of liberal economics. But a free market developed, and grew; the law of contract was the legal reflection of that market and naturally took on its characteristics. Contract was abstract; the free market was abstract; and the two institutions directed behavior along similar channels.

LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA* 21–22 (1965).

<sup>52</sup> See Williston, *supra* note 33, at 367–69.

<sup>53</sup> *Id.* at 368.

<sup>54</sup> The view that the exercise of freedom of contract, as envisioned by classical theory, maximizes the parties’ expected utilities continues to influence contemporary contract thinking.

A complex of social propositions supports the bargain principle. Parties are normally the best judges of their own utility, and normally reveal their determinations of utility in their promises. Bargain promises are normally made in a deliberative manner for personal gain, and promises so made should normally be kept. Bargains normally create value, enable the parties to plan their future conduct reliably, allocate commodities to their highest-valued uses, and best distribute the factors of production, and the enforcement of bargain promises promotes these desirable ends. Ultimately, these propositions, and therefore the bargain principle itself, rest on the empirical premise that in making a bargain a contracting party will act with full cognition to rationally maximize his subjective expected utility.

Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 211–12 (1995) (footnote omitted); see also Alan Schwartz, *Karl Llewellyn and the Origins of Contract Theory*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 12 (Jody S. Kraus & Steven D. Walt eds., 2000) (discussing the role that this view plays in Karl Llewellyn’s contract theory as well as in the provisions of current Article 2).

and efficient exchange of goods and services.<sup>55</sup> Parties mold contract rights and obligations to meet their expectations, thus satisfying market needs for flexibility in contract.<sup>56</sup>

But fairness is achieved and utilities are maximized only if freedom of contract is unrestricted by legislative enactments or judicial decisions.<sup>57</sup> Accordingly, classical theory demands that government exercise restraint.<sup>58</sup> Government is best when it

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<sup>55</sup> The optimistic view of nineteenth century economists that the pursuit of self-interest promotes community welfare was adopted by contract theorists to support the proposition that harmony existed between freedom of contract and the good of all. See generally Cohen, *supra* note 45; John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 237 (1942) ("We have been proud of our 'freedom of contract,' confident that the maximum of social progress will result from encouragement of each man's initiative and ambition by giving him the right to use his economic powers to the full."); Kessler, *supra* note 37, at 640 ("The 'prestabilized harmony' of a social system based on freedom of enterprise and perfect competition sees to it that the 'private autonomy' of contracting parties will be kept within bounds and will work out to the benefit of the whole.").

<sup>56</sup> See Kessler, *supra* note 37, at 629 ("But the law cannot possibly anticipate the content of an infinite number of atypical transactions into which members of the community may need to enter. Society, therefore, has to give the parties freedom of contract . . .").

<sup>57</sup> The classic expression of freedom of contract is found in *Printing & Numerical Registering Co. v. Sampson*, 19 L.R.-Eq. 462 (M.R. 1875).

It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract.

*Id.* at 465.

<sup>58</sup> Contract scholars emphasized that courts were not to inquire into the fairness of contract terms.

[E]very person who is not from his peculiar condition or circumstances under disability is entitled to dispose of his property in such manner and upon such terms as he chooses; and whether his bargains are wise and discreet, or profitable or unprofitable or otherwise, are considerations not for courts of justice but for the party himself to deliberate upon.

I JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 337 (14th ed. 1918). The notion that each party must be free to choose terms upon which he is willing to bargain, whether such terms are wise or unwise, is expressed in the principle that courts will not inquire into the adequacy of consideration. See RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. c (1981).

However, courts of equity were not reluctant to scrutinize the fairness of bargains and would refuse equitable relief when the contract was one "such as no man in his senses and not under delusion would make on the one hand, and as no

governs least because “[w]e could not achieve any positive good by law; we could only avert some evils.”<sup>59</sup>

Nineteenth century scholars also believed that the institution of contract was the key to social progress. Contract rivaled only the church and the family in providing a principle of organization for society.

In summary view of civil order in society, as constituted in accordance with the individualistic ideal, performance of contract presents itself as the chief positive element. Withdraw contract—suppose that no one can count upon the fulfillment of any engagement—and the members of a human community are atoms that cannot effectively combine; the complex cooperation and division of employments that are essential characteristics of modern industry cannot be introduced among such beings. Suppose contracts freely made and effectively sanctioned, and the most elaborate social organization becomes possible, at least in a society of such human beings as the individualistic theory contemplates—gifted with mature reason, and governed by enlightened self-interest.<sup>60</sup>

#### *B. The Common Law Tradition and Limitations Upon Freedom of Contract*

Classical contract theory, however, did not mirror the law as interpreted and applied by the courts. By the late 1800s, freedom of contract was limited not only by principles which gave minors and those with mental incapacities the power to avoid contractual obligations, but also by the doctrines of duress, undue influence, and fraud. These exceptions acknowledge that equal parties do not always exist in the marketplace and, therefore, that bargains ought not be enforced as made when inequality puts the health, safety, or economic welfare of weaker parties at risk.<sup>61</sup> Moreover, the notion that a “meeting of minds” was required to form a contract gradually yielded to the concept of manifestation of mutual assent, which induces confidence that promises made in the course of doing business will be performed and enforced. This confidence provides stability in contract

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honest and fair man would accept on the other.” *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (Ch. 1750).

<sup>59</sup> Pound, *supra* note 46, at 208 (remarking on the importance of the principle of government restraint in nineteenth century juristic thought).

<sup>60</sup> HENRY SIDGWICK, *THE ELEMENTS OF POLITICS* 82 (1908).

<sup>61</sup> See FARNSWORTH, *supra* note 4, §§ 4.2–.20.



relationships and promotes certainty that markets will function without disruption.<sup>62</sup> Finally, freedom to contract was also limited by courts that struck down penalties, forfeitures, and contracts in restraint of trade.<sup>63</sup>

Legislatures also carved out exceptions to the principle of government restraint. Usury statutes, prohibitions against lotteries, and Sunday laws all made inroads upon unrestricted self-expression,<sup>64</sup> prompting some scholars to caution that only legislative enactments which serve the public good can be reconciled with the concept of liberty.<sup>65</sup> Although limitations upon freedom of contract were deemed necessary to curb abuses fostered by disparities in bargaining power, they were believed to undermine marketplace certainty and stability. The need to choose between liberty, which requires government restraint, and fairness for individual parties, who are vulnerable or weak, was described in the classic case of *Henry v. Root*.<sup>66</sup> The court observed that:

A protracted struggle has been maintained in the courts, on the one hand, to protect infants or minors from their own improvidence and folly, and to save them from the depredations and frauds practised upon them by the designing and unprincipled, and on the other, to protect the rights of those dealing with them in good faith and on the assumption that they could lawfully make contracts.<sup>67</sup>

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<sup>62</sup> See, e.g., *Hotchkiss v. Nat'l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."); see also Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 273 (1986) (discussing the role that the objective theory plays in creating certainty and stability in the marketplace).

<sup>63</sup> These are examples given by Samuel Williston to illustrate that the power of parties to determine contract content was limited by courts during the nineteenth century. Williston, *supra* note 33, at 373-74.

<sup>64</sup> See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

<sup>65</sup> See, e.g., *SIDGWICK*, *supra* note 60, at 162.

<sup>66</sup> 33 N.Y. 526 (1865).

<sup>67</sup> *Id.* at 535-36. The tension which is created when courts intervene to protect those who are vulnerable to unfair overreaching is noted in the RESTATEMENT (SECOND) OF CONTRACTS (1981). See, e.g., *id.* § 15 cmt. a ("A contract made by a person who is mentally incompetent requires the reconciliation of two conflicting policies: the protection of justifiable expectations and of the security of transactions, and the protection of persons unable to protect themselves against imposition.").

The fear that government intervention in contract affairs would frustrate reasonable expectations and hamper market efficiency discouraged judicial activism during the 1800s. The doctrines of fraud and duress, for example, were narrowly defined until well into the twentieth century.<sup>68</sup> By the late 1800s, however, the labor movement had emerged and workers demanded an end to oppression in their relationships with business. The tug of war between social control and freedom of contract exploded, pitting labor against business and legislatures against courts.

## II. THE ROLE OF LEGISLATURES IN CONTRACT AFFAIRS

### A. *The Labor Movement*

Following the Civil War, the agrarian economy was changed by the factory system and by the national railroad into an industrial economy of mass production and national distribution. In the new economic order, equal bargaining power did not exist between employer and employee. The working class worked for substandard wages from "dawn to dark."<sup>69</sup> The pursuit of private self-interest by powerful industrialists threatened the health, safety, and economic welfare of thousands of men, women, and children whose "daily [lives were] miserable because of low wages and shocking housing conditions in the slums, common to all the great cities."<sup>70</sup> In 1888, President Grover Cleveland described the struggle between business and the working class in his annual message to Congress.

As we view the achievements of aggregated capital, we discover the existence of trusts, combinations and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters . . . .<sup>71</sup>

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<sup>68</sup> See FARNSWORTH, *supra* note 4, §§ 4.11, 4.18.

<sup>69</sup> BOYER & MORAIS, *supra* note 34, at 79. The authors state that the average work day in some trades was fourteen to eighteen hours and that wages were usually between \$7.50 and \$8.00 per week. *Id.*

<sup>70</sup> *Id.* at 78.

<sup>71</sup> *Id.* at 65 (quoting President Grover Cleveland, Annual Message to Congress (1888)).

Labor's campaign to halt the oppression of workers intensified during the late 1800s. The organization of labor unions marked the beginning of bitter and often bloody strikes in American cities. Widespread worker resentment and unrest threatened to disrupt the economic welfare of Americans. By the turn of the century, the tide began to turn and many states adopted laws to provide for workman's compensation and minimum wages, to limit the working day, and to restrict child labor.<sup>72</sup>

On the other hand, nineteenth century jurisprudence retained its vigor for some of this country's intellectual elite.<sup>73</sup> The United States Supreme Court declared many state economic regulations designed to benefit workers to be void on the grounds that they were an unwarranted and arbitrary interference with an individual's right to contract freely.<sup>74</sup> Liberty of contract found its most rigorous expression in the classic case of *Lochner v. New York*<sup>75</sup> in which the Court declared unconstitutional a New York law that prohibited the employment of bakery workers for more than ten hours per day or sixty hours per week. Liberty of contract, the Court reasoned, was a fundamental property right protected by the Due Process Clause of the Constitution.<sup>76</sup> The Court declared that the New York law could not be upheld as a labor law or as a health law<sup>77</sup> because it ran counter to "that

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<sup>72</sup> *Id.* at 180.

<sup>73</sup> Some scholars opposed legislative measures that established maximum hours of labor on the basis that they were "uncompromisingly anti-individualistic." SIDGWICK, *supra* note 60, at 162.

<sup>74</sup> See Jessica E. Hacker, Comment, *The Return to Lochnerism? The Revival of Economic Liberties from David to Goliath*, 52 DEPAUL L. REV. 675, 686 (2002) (noting that after 1905, the Supreme Court struck down more than two hundred state economic regulations designed to protect American workers). See generally SIDGWICK, *supra* note 60, at 162 n.1 ("But so far as the admitted effect of the measure is to diminish the amount of daily service rendered by the labourer to society, I think that no government ought to take the responsibility of causing the consequent loss of wealth to individuals and to the community as a whole."); Pound, *supra* note 51, at 482 ("But one cannot read the cases in detail without feeling that the great majority of the decisions are simply wrong, not only in constitutional law, but from the standpoint of the common law, and even from that of a sane individualism").

<sup>75</sup> 198 U.S. 45 (1905).

<sup>76</sup> *Id.* at 64 ("[T]he freedom of . . . contract . . . cannot be prohibited or interfered with, without violating the Federal Constitution.").

<sup>77</sup> See *id.* at 57-61.

liberty of person and of free contract provided for in the Federal Constitution."<sup>78</sup>

Radical jurisprudence, though, was not sufficiently powerful in comparison to the country's need to address the economic and social issues generated by the Great Depression. By the early 1930s, Supreme Court decisions signaled a change in judicial thinking.<sup>79</sup> The notion that legislatures have power to limit freedom of contract "where it is conceived that public policy requires it . . . unless limitations are arbitrary or wanton interference with liberty"<sup>80</sup> gradually became embedded in modern contract jurisprudence.

It is a saving characteristic of Anglo-American case law, that decisions upon an unsound principle are gradually surrounded by a mass of exceptions, distinctions and limitations which preclude extension for the future and soon enable the current of judicial decision to flow normally. Just as in the natural body foreign substances are encysted and walled in and thus deprived of power for evil, the body of our case law has the faculty of encysting and walling in rules and doctrines at variance with a sound condition of the law. Such a process has long been going on with respect to extreme doctrines of liberty of contract.<sup>81</sup>

Many scholars applauded the efforts of legislatures to address workers' grievances.<sup>82</sup> Unlimited freedom of contract, they declared, secures individual and community welfare only in theory and theory does not mirror the real world where inequalities exist.<sup>83</sup> They were confident that reasonable experimentation by legislatures would find that combination of

<sup>78</sup> *Id.* at 62.

<sup>79</sup> See Hacker, *supra* note 74, at 687 (citing *Nebbia v. New York*, 291 U.S. 502 (1934) (confirming the Court's rejection of its reasoning in *Lochner*)).

<sup>80</sup> Williston, *supra* note 33, at 378; see also Pound, *supra* note 51, at 482–86 (noting that such limitations had always existed in the law, but conceding that they were unrecognized by some jurists who insisted upon applying the concept of liberty of contract as envisioned by nineteenth century theorists).

<sup>81</sup> Pound, *supra* note 51, at 484.

<sup>82</sup> *Id.* at 483 ("Surely what equity has done to abridge freedom of contract, legislation may do likewise.").

<sup>83</sup> See, e.g., E. Merrick Dodd, *From Maximum Wages to Minimum Wages: Six Centuries of Regulation of Employment Contracts*, 43 COLUM. L. REV. 643, 643 (1943) ("The modern period has been one in which a new impulse towards regulation has gathered strength as a result of our experience of the evils to which unlimited freedom of contract gives rise in an industrial society characterized by extreme inequalities of wealth and bargaining power.").

government control and freedom of contract that maintains harmony between the interests of individual parties and the good of the community as a whole.<sup>84</sup> In his classic essay, *Due Process of Law and the Eight-Hour Day*,<sup>85</sup> Learned Hand warned that this confidence must be tempered with the knowledge that legislative enactments that limit freedom of contract for the purpose of protecting the welfare of workers entail consequences for these workers as well as for others and that only experience determines what these consequences are and whether they can be measured with certainty.<sup>86</sup> Hand's observations had taken on a sense of urgency. For decades, courts had recognized that government intervention intended to protect those who are at risk creates tension between the desire to achieve just results and the need to maintain certainty and stability in contract relationships. It was evident that the effects of court rules, which protect those who were vulnerable to unfair overreaching, could not rival, at least in scope, the results of legislative action which controls terms and conditions of employment for scores of Americans. The question of whether legislative measures which restrict freedom of contract benefit those within their terms without imposing excessive expense or injury upon others triggered a debate that lingers to this day.<sup>87</sup>

### B. *Government Regulation and the Need to Experiment*

In his essay, Learned Hand condemned the decision of the United States Supreme Court in *Lochner v. New York* on the

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<sup>84</sup> Samuel Williston acknowledged the need for experimentation to determine the wisdom of limitations upon freedom of contract.

The extent to which freedom of contract should be limited inevitably becomes a question of degree to which not even an attempt at an answer can be made without reference to time, place and circumstance; and there is nothing in our Constitutions which should prevent reasonable experiment to aid in the decision.

Williston, *supra* note 33, at 379.

<sup>85</sup> Hand, *supra* note 36.

<sup>86</sup> *Id.* at 507-08.

<sup>87</sup> Hand identified the issues raised by a law that limits freedom in the interests of individual contracting parties.

That is, there can be no question that such a regulation actually affects the "welfare" of the persons within its terms; but there may well be a question whether, all things considered, it affects them beneficially, or, if beneficially, whether it does not do so at a corresponding expense arbitrarily imposed upon other persons.

*Id.* at 503.

grounds that the Court had exceeded its power in declaring the law void. "In this way the principle may be observed that with the expediency of the statute the court has no concern, but only with the power of the legislature."<sup>88</sup> In prior decades, courts had declined to strike down laws that regulated working conditions in factories and mines, making it too late, Hand noted, to question the power of the legislature to enact laws which set maximum hours of labor.<sup>89</sup>

For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force.<sup>90</sup>

Moreover, it is only appropriate, Hand declared, that this power rest with the legislature, the "more genuinely representative"<sup>91</sup> branch of government. The result of a law that limits freedom of contract is a matter over which there can be reasonable debate, and legislatures, under these circumstances, are better suited than courts to determine whether the state should intervene or leave market forces unchanged. Legislatures must acknowledge this uncertainty and "answer the problems which it raises, with such wisdom as society can collectively muster."<sup>92</sup>

According to Hand, the law struck down by the Supreme Court in *Lochner v. New York* illustrates the uncertainty which surrounds the relative merits of freedom of contract and government regulation. One theory is that such a law does not benefit workers because it means a reduction in pay and "an enforced leisure they may not want."<sup>93</sup> Moreover, a law which mandates a shorter workday may decrease productivity, causing an increase in the price of goods and services or a loss to the employer.<sup>94</sup> Such a theory, Hand observed, may not be true. It may be that such a law does not entail unwanted burdens for workers or for others. A shorter workday may improve the

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<sup>88</sup> *Id.* at 500.

<sup>89</sup> *Id.* at 502.

<sup>90</sup> *Id.* at 506.

<sup>91</sup> *Id.* at 508.

<sup>92</sup> *Id.* at 507.

<sup>93</sup> *Id.* at 504.

<sup>94</sup> *See id.*

health of workers, though such a result cannot be measured with precision.<sup>95</sup> Moreover, "[t]he indirect effects upon the morale of workers and the stimulus to improvement in the technique of the arts arising from a shorter day may indeed be enough to make up economically for their apparent decreased production."<sup>96</sup> Under these circumstances, loss to the consumer or to the capitalist is avoided. Neither theory, though, is proven and "that throws the whole matter open for exclusive consideration, and for exclusive determination, by the legislature."<sup>97</sup>

In short, the whole matter is yet to such an extent experimental that no one can with justice apply to the concrete problems the yardstick of abstract economic theory. We do not know, and we cannot for a long time learn, what are the total results of such "meddlesome interference with the rights of the individual." He would be as rash a theorist who should assert with certainty their beneficence, as he who would sweep them all aside by virtue of some pragmatical theory of "natural rights." The only way in which the right, or the wrong, of the matter may be shown, is by experiment; and the legislature, with its paraphernalia of committee and commission, is the only public representative really fitted to experiment.<sup>98</sup>

In drawing the line between legislative power and judicial power, Hand identified the dilemma that legislatures face when choosing between freedom of contract and government regulation. If legislators choose to intervene because they believe that inequalities have fostered injustice, they enter uncharted waters for they do not know whether benefits or burdens will flow from their actions and whether these effects can be accurately measured. Thus, uncertainty is inevitable in the struggle to end the evils which exist in the marketplace and to find that combination of social control and freedom of contract which best serves contract objectives. "The result stands in trial, not in dialectic; but we must insist upon the reasonable expectation of those who view it hopefully, and we must seek to advance it, at least until it has been demonstrated to be false."<sup>99</sup>

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<sup>95</sup> See *id.* at 504-05.

<sup>96</sup> *Id.* at 505.

<sup>97</sup> *Id.* at 507.

<sup>98</sup> *Id.* at 507-08 (citations omitted).

<sup>99</sup> Learned Hand, *The Hope of the Minimum Wage*, NEW REPUBLIC, Nov. 20, 1915, at 66-67, quoted in GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 251 (1994).

## III. ARTICLE 2 OF THE UNIFORM COMMERCIAL CODE

*A. The Shortcomings of the Uniform Sales Act*

In the early twentieth century, the organization of the Interstate Commerce Commission, the Federal Trade Commission, and state administrative agencies, such as insurance departments, indicated an increasing reliance upon government regulation of essential services and contracts to protect the public interest. Liberty of contract, as envisioned by classical contract theory, was declared to be "one of the most pervasive and persistent vices of reasoning on practical affairs, to wit, the setting-up of premises that are too wide for our purpose and indefensible on their own account."<sup>100</sup> During the 1930s, government regulation continued to expand, driven forward by President Franklin Roosevelt's New Deal. On the other hand, modern contract jurisprudence, which signaled a retreat from radical individualism, was only in its infancy, and the free market model remained the model of choice to govern sales of goods transactions. The provisions of the Uniform Sales Act of 1906 (the "Sales Act") were constructed upon this model and mirrored common law rules created by courts during the nineteenth century.<sup>101</sup> By the late 1930s, there was widespread agreement that its provisions were obsolete, frustrating both fairness and efficiency in the marketplace.<sup>102</sup>

The principles of the Sales Act did not address, much less remedy, injustices perpetrated by merchants who were willing to

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<sup>100</sup> Cohen, *supra* note 45, at 559. During the 1930s and 1940s, numbers of writers criticized classical contract theory on the grounds that it failed to mirror contract practice. See, e.g., John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 345 (1937) ("The system of 'free' contract described by nineteenth century theory is now coming to be recognized as a world of fantasy, too orderly, too neatly contrived, and too harmonious to correspond with reality."); Karl N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 409 (1937).

<sup>101</sup> The Uniform Sales Act was enacted in 36 states. See Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 483 (1987); see also Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341, 1341-42, 1347-51 (1948) (criticizing these provisions); Karl N. Llewellyn, *The Needed Federal Sales Act*, 26 VA. L. REV. 558, 558-60 (1940) (same).

<sup>102</sup> See Allen R. Kamp, *Between-the-Wars Social Thought: Karl Llewellyn, Legal Realism, and the Uniform Commercial Code in Context*, 59 ALB. L. REV. 325, 335 (1995) ("The common law and the traditional constitutional system were not only inefficient, but were also incapable of protecting individuals.").



deviate from market norms of honesty, decency, and fairness. The existence of cut-throat competition, the manufacture of shoddy and defective merchandise, and the payment of substandard wages were symptoms of an economic order<sup>103</sup> where "that precious commodity Justice must be viewed as being as scarce as the scarcer economic goods."<sup>104</sup> The plight of the consumer attracted only modest attention. Although Congress had enacted some laws to protect the health and safety of Americans placed at risk by the sale of adulterated and untested food and drugs, there were no systematic efforts to address consumers' economic welfare.<sup>105</sup> The legislatures' indifference was not surprising. Consumers were not organized in the 1930s to lobby for reform measures and attempts to identify the causes of economic loss were just beginning. Scholarly writings, which explored consumers' plight, focused almost exclusively on the manufacture and sale of dangerous and defective products<sup>106</sup> and on the use of the standard form contract in goods and service transactions.<sup>107</sup> Although standard contracts were the most efficient and effective method of doing business in an economy of mass production and mass distribution, the opportunity to bargain over terms was either limited or non-existent. Scholars acknowledged that these contracts were necessary to meet the demands of an industrial economy,<sup>108</sup> but they lamented that

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<sup>103</sup> Professor Kamp made the following observation:

The pre-Keynesian macro-economists believed that business was caught in a vicious cycle. They thought that overproduction led to lower prices and "chiseling," the lessening of the quality of goods and cheating, which further caused lower wages, decreased demand, overproduction, and, finally, lower prices and chiseling again. This process was further characterized by chaotic fluctuations in production, poor quality goods, ruinous cut-throat competition, and wages too low to allow workers and their families to maintain minimum standards of health and welfare.

*Id.* at 365-66 (citations omitted).

<sup>104</sup> Llewellyn, *supra* note 100, at 401.

<sup>105</sup> See Barber, *supra* note 42, at 1205-17 (discussing federal and state efforts to protect consumers' health, safety, and economic welfare during the early decades of the twentieth century); Philip A. Hart, *Can Federal Legislation Affecting Consumers' Economic Interests Be Enacted?*, 64 MICH. L. REV. 1255, 1255-58 (1966).

<sup>106</sup> See, e.g., Llewellyn, *supra* note 100, at 404-08.

<sup>107</sup> See, e.g., Kessler, *supra* note 37, at 631-33; Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731-34 (1931); Karl N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 700-01 (1939).

<sup>108</sup> See, e.g., Cohen, *supra* note 45, at 589. Standard form contracts continue to be regarded as indispensable to the efficient transaction of business in our modern economy. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 211, cmt. a (1981); see

merchants, who had superior bargaining power, could use that power to impose terms which denied relief to aggrieved consumers.<sup>109</sup> As Llewellyn lamented, "What is certain is that the spreading vogue of draftsmanship has carried lop-sided manipulation into the game of Sales Law—and especially as against an ultimate-consumer-buyer."<sup>110</sup>

Courts were caught between existing common law principles that assumed equal bargaining power, knowledge and skill and the realities of contract practice. Although the principle of *caveat emptor* was on the decline,<sup>111</sup> the rule that a party is bound to a contract even though the contract is unread or its contents not understood continued to dominate judicial decision-making.<sup>112</sup> In extraordinary circumstances, courts did provide relief to those who had executed standard form contracts that contained harsh and oppressive non-negotiated terms. Such relief, however, usually flowed from the manipulation of common law principles and doctrines,<sup>113</sup> a practice condemned by contract scholars.<sup>114</sup>

Moreover, scores of judicial decisions highlighted the harm to market efficiency caused by the application of outdated and inflexible common law and statutory principles to resolve

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also Slawson, *supra* note 11, at 529–30 (stating that standard form contracts "account for more than ninety-nine percent of all contracts now made" and that their "predominance . . . is the best evidence of their necessity").

<sup>109</sup> See, e.g., Kessler, *supra* note 37, at 640.

<sup>110</sup> Llewellyn, *supra* note 100, at 394.

<sup>111</sup> See W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 15 (1936) (remarking on the judicial trend away from rigid application of the doctrine of *caveat emptor*). But see Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133, 1187 (1931) ("But, lest there be mistake about it, *caveat emptor* is not yet a historical doctrine. . . . The protection accorded the buyer is as yet neither broad nor certain.").

<sup>112</sup> "[I]t is as much the duty of a person who cannot read the language in which a contract is written to have someone read it to him before he signs it, as it is the duty of one who can read to peruse it himself before signing it." *Stern v. Moneyweight Scale Co.*, 42 App. D.C. 162, 165 (D.C. Cir. 1914) (citation omitted). This principle continues to influence judicial thinking. See, e.g., *Nat'l Bank of Washington v. Equity Investors*, 506 P.2d 20, 36 (Wash. 1973) ("The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.").

<sup>113</sup> See FARNSWORTH, *supra* note 4, § 4.26 (outlining the techniques used by courts to reach just results).

<sup>114</sup> In a much quoted criticism, Karl Llewellyn wrote: "The net effect is unnecessary confusion and unpredictability, together with inadequate remedy, and evil persisting that calls for remedy. Covert tools are never reliable tools." Llewellyn, *supra* note 107, at 703.

contract disputes between merchants.<sup>115</sup> The drafters tailored the provisions of the Sales Act to meet the needs of an agrarian economy characterized by short term, single transactions between merchants and customers who negotiated face to face. In the years following its adoption by state legislatures, new methods of doing business were developed to meet the needs of an industrial economy. As one commentator noted, "Horse law and hay stack law are uneasily tolerated in the complex business of mass production and national distribution."<sup>116</sup> In the new economic order, merchants frequently contracted for performance to occur over a long period of time. Such contracts were often incomplete in one or more of their terms because parties failed to agree on all essential terms or to provide for unforeseen events. Existing principles were often rigidly applied to render such contracts unenforceable, frustrating the intent of the parties.<sup>117</sup> Moreover, some courts applied traditional principles in a mechanical fashion and declared output and requirements contracts to be void for failure to satisfy the requirement of mutuality of obligation. These decisions hampered the development of new and efficient forms of doing business. Other courts, however, refused to be bound by outdated rules and concluded that such contracts were enforceable.<sup>118</sup> Contract principles were inconsistent, creating uncertainty in the marketplace over which promises, among all promises, would be enforced. The need for a code to provide a complete and all-inclusive system of principles and doctrines emerged.<sup>119</sup>

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<sup>115</sup> See Walter F. Pratt, Jr., *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 415-19 (1988) (discussing some of these cases and how courts used the concept of good faith to bridge the gap between obsolete contract principles and the needs of modern commerce).

<sup>116</sup> Gilmore, *supra* note 101, at 1341.

<sup>117</sup> See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 2.9 (4th ed. 1998) (discussing the traditional common law rules regarding indefiniteness in contract terms); see also U.C.C. § 2-204(3) (2003) (providing that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.").

<sup>118</sup> See Pratt, *supra* note 115, at 443-50 (discussing judicial treatment of output and requirements contracts during the early 1900s); see also U.C.C. § 2-306. Comment 2 to section 2-306 states that output and requirements contracts are neither too indefinite nor lacking in mutuality of obligation. *Id.* § 2-306 cmt. 2.

<sup>119</sup> See William D. Hawkland, *The Uniform Commercial Code and the Civil Codes*, 56 LA. L. REV. 231, 231-35 (1995) (discussing the reasons why the common

### B. Article 2 and the Need for Compromise

It was against this background that efforts to modernize commercial law in this country began. In 1942, Karl Llewellyn was appointed by the ALI and the NCCUSL to serve as chief reporter for the Code and principle draftsman for Article 2.<sup>120</sup> The Article 2 Drafting Committee faced difficult choices. By 1940, scholars had conceded that the institution of contract had lost some of its vigor as an organizing principle for society.<sup>121</sup> Nonetheless, they remained confident that the institution could continue to maximize individual welfare and promote the common good if changes were made in the free market model and uniform principles were developed to govern the formation, performance, and enforcement of the bargain contract.<sup>122</sup> Some

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law system had failed to produce certainty and uniformity in the law and explaining why the drafters of the UCC believed that a code would achieve these objectives).

<sup>120</sup> "Despite the numbers of persons involved in the drafting of the Code, the extent to which it reflects Llewellyn's philosophy of law and his sense of commercial wisdom and need is startling." Soia Mentschikoff, *Highlights of the Uniform Commercial Code*, 27 MOD. L. REV. 167, 168 n.3 (1964); see also Allen R. Kamp, *Downtown Code: A History of the Uniform Commercial Code: 1949-54*, 49 BUFF. L. REV. 359, 359-91 (2001) (discussing the drafting process and Karl Llewellyn's contributions to the Code); Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-49*, 51 SMU L. REV. 275 (1998) [hereinafter Kamp, *Uptown Act*] (same); A. Brooke Overby, *Modeling UCC Drafting*, 29 LOY. L.A. L. REV. 645, 650-56 (1996) (providing a history of the sponsoring organizations).

Several commentators have analyzed Llewellyn's contract theory as reflected in his writings published between 1925 and 1940. See Schwartz, *supra* note 54; Scott, *supra* note 23, at 1014-46. Other writings have focused on Llewellyn's views as reflected in Article 2's provisions. See, e.g., Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621 (1975); John L. Gedid, *U.C.C. Methodology: Taking A Realistic Look at the Code*, 29 WM. & MARY L. REV. 341 (1988); Wiseman, *supra* note 101.

<sup>121</sup> "The enormous growth of the corporation . . . has meant a further decrease in the importance of contract as an organizing force, since the corporation and vertical integration tend to substitute for an organization resting on contract one resting on the relation of superior and inferior." L.L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52, 63 n.13 (1936).

<sup>122</sup> A number of scholars have discussed Llewellyn's commitment to fundamental contract objectives. See, e.g., Schwartz, *supra* note 54. Professor Danzig has observed that Llewellyn admitted that his knowledge of the consequences of contracting was limited.

It is interesting that in his academic writings Llewellyn claimed that he shared a concern for the effects of transactions on those other than the parties to the transaction, but, as in his response to Pound about goal orientation, he pleaded that for the moment he lacked the time or knowledge to deal with that dimension.

Danzig, *supra* note 120, at 630 n.33.

scholars believed that government regulation of sales transactions was inevitable, especially in the interests of consumers.<sup>123</sup> Still, no one had created a new vision of the marketplace that identified the degree to which freedom of contract should be limited. The drafting of Article 2 provided the opportunity to define this vision.

The question of whether Article 2 should incorporate regulatory measures to address lopsided bargains and the sale of defective merchandise created tension among the members of the Drafting Committee.<sup>124</sup> The final work product did not include innovative measures, such as strict liability for dangerous product defects,<sup>125</sup> suggested by Llewellyn during the 1940s.<sup>126</sup> In the end, Llewellyn was forced to compromise in order to ensure approval by the sponsoring organizations and uniform enactment by the states,<sup>127</sup> and compromise produced a system of principles and doctrines that struck a balance in favor of both freedom from government intrusion and freedom to contract upon such terms as the parties might choose.<sup>128</sup>

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<sup>123</sup> See Gilmore, *supra* note 101, at 1358.

<sup>124</sup> See Wiseman, *supra* note 101, at 467 (stating that the Code "was the result of a sometimes painful twenty year period of compromise among a broad range of participants").

<sup>125</sup> Other proposals included fact finding merchant juries, regulation of standard form contracts, and control of remedy modifications. See Kamp, *supra* note 120, at 281, 294-95; Wiseman, *supra* note 120, at 526-27.

<sup>126</sup> See Wiseman, *supra* note 101, at 520 (stating that opposition to the merchant rules, for example, was based on the perception that Llewellyn intended to use the rules "to impose upon merchants his own normative vision of what those practices should be").

<sup>127</sup> Llewellyn expressed disappointment that compromise was necessary to ensure consensus. In 1953, he wrote:

I am ashamed of it in some ways; there are so many pieces that I could make a little better; there are so many beautiful ideas I tried to get in that would have been good for the law, but I was voted down. A wide body of opinion has worked the law into some sort of compromise after debate and after exhaustive work. However, when you compare it with anything that there is, it is an infinite improvement.

Karl Llewellyn, *Why A Commercial Code?*, 22 TENN. L. REV. 779, 784 (1953).

<sup>128</sup> Professor Kamp has identified the opposing viewpoints that emerged during the drafting process:

Llewellyn wanted to create a commercial law consistent with both his anthropological vision and the folkways of merchants; Wall Street wanted to achieve an efficient, persuasive, profit-maximizing commercial regime based on individual contracting. There are three themes that constantly recur in Llewellyn's thought: the primacy of trade usages, the goal of modernistic efficiency, and the need for balanced trade rules. The history of the drafting of the U.C.C., therefore, is the story of how the drafters

### C. *Freedom of Contract as Defined by Current Article 2*

Freedom of contract provides the fundamental component of Article 2's structure.<sup>129</sup> The doctrine, as envisioned by Article 2, is striking in both its similarities to and differences from the doctrine as defined by classical contract theory. The Article's definition is reminiscent of the classical doctrine in its reliance upon the notion that parties are better suited than courts or legislatures to determine the terms of their bargain.<sup>130</sup>

Both contract-right and exemption by contract from duty have been from early times in the nature of privilege accorded by law *for a reason*. The reason was, for almost a century, that the animals probably knew their own business better than their keeper did—a theory which has not only charm but virtue, *most* of the time.<sup>131</sup>

Thus, with only limited exceptions,<sup>132</sup> parties may vary the effect of Article 2's provisions, including those which create standard terms,<sup>133</sup> and they may customize rights and obligations to meet their unique needs and expectations. The Article's definition of freedom of contract rests upon the assumptions, borrowed from classical theory, that parties possess relatively equal bargaining power, knowledge, and skill and that enforcement of bargains as made will maximize utilities and promote efficiency in the marketplace.<sup>134</sup>

attempted to make room for each vision, to choose between the visions, and to come up with devices that would mediate between them.

Kamp, *Uptown Act*, *supra* note 120, at 283 (footnote omitted).

<sup>129</sup> U.C.C. § 1-302(a) provides in part that "the effect of provisions . . . may be varied by agreement." U.C.C. § 1-302(a) (2003). Professor Schwartz observed: "Llewellyn paid considerable attention to freedom of contract issues . . . because of the epistemological role that actual contracting played in his theory. When parties contracted under ideal conditions, the deal would maximize the utility of both." Schwartz, *supra* note 54, at 31; *see also* Scott, *supra* note 23, at 1025–29 (stating that Llewellyn preferred "selective" regulation over mandatory rules).

<sup>130</sup> "The Code emphasizes that we should not be making contracts for the parties—a view that was espoused at common law but often smothered by technical requirements." John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1451 (1994).

<sup>131</sup> Llewellyn, *supra* note 100, at 403.

<sup>132</sup> *See infra* notes 153–68 and accompanying text.

<sup>133</sup> *See, e.g.*, U.C.C. §§ 2-303 to -315.

<sup>134</sup> Professor Schwartz has concluded that Llewellyn's most important contribution to contract law was the development of a "general approach to the legal analysis of contract." Schwartz, *supra* note 54, at 18. He observed:

Llewellyn's general substantive and institutional approaches to sales and contract law remain relevant. Modern law and economic scholars believe,

Article 2, however, departs from classical theory in order to accommodate Llewellyn's vision of merchant reality. Classical theory assumed that "all obligation would arise only out of the will of the individual contracting freely."<sup>135</sup> By the end of the nineteenth century, courts had abandoned the principle that assent to contract requires a "meeting of minds" in favor of the objective theory that a "contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent."<sup>136</sup> The view that each party was an autonomous actor in the marketplace did, though, remain unchanged.<sup>137</sup> Article 2 rejects this view and replaces it with a vision of the party whose "individual will . . . is a social product, unique in its particular needs and desires, but fundamentally constituted according to communal norms."<sup>138</sup>

Llewellyn relied upon prevailing theories of anthropology and economics, which studied groups and how they work, to develop the concepts of merchant groups and merchant self-regulation through trade usage.<sup>139</sup> He believed that markets are composed of merchant groups and that, over the course of time, each group establishes its own "practice[s] [and] method[s] of

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with Llewellyn, that the state should pursue efficiency in the contract area because efficiency is the only implementable goal. And efficiency should be pursued, by and large, in the ways that Llewellyn advocated: Courts should enforce the deals that parties make, which requires courts to understand the economics of commercial transactions.

*Id.*; see also Donald A. Farber, *Economic Efficiency and the Ex Ante Perspective*, in *THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW* 54 (2000) (discussing what role, if any, the principle of efficiency should play in contemporary contract analysis).

<sup>135</sup> See Cohen, *supra* note 45, at 558.

<sup>136</sup> *Hotchkiss v. Nat'l City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911).

<sup>137</sup> LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 21 (1965) (observing that nineteenth century models of contract law and economics treated parties as "individual economic units which, in theory, enjoyed complete mobility and freedom of decision").

<sup>138</sup> Amy H. Kastely, *Stock Equipment for the Bargain in Fact: Trade Usage, "Express Terms" and Consistency Under Section 1-205 of the Uniform Commercial Code*, 64 N.C. L. REV. 777, 814-15 (1986); see also Kamp, *supra* note 102, at 395 (stating that "freedom of contract, or at least an individual's freedom of contract, is not a principle of the UCC").

<sup>139</sup> See Kamp, *supra* note 102, at 345-71; see also David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 BUFF. L. REV. 1457, 1459-62 (1999) (discussing the prevailing anthropological, contract, and economic theories that influenced Llewellyn).

dealing.”<sup>140</sup> When a practice or method of dealing has “such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question,” it rises to the level of trade usage.<sup>141</sup> Trade usage serves two separate, but related, functions. First, Article 2 incorporates trade usage, along with course of performance<sup>142</sup> and course of dealing,<sup>143</sup> to explain, supplement,

<sup>140</sup> See U.C.C. § 1-303(c) (2003).

<sup>141</sup> *Id.* “Usage of trade” is defined as “any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.” *Id.*

Comment 4 to U.C.C. § 1-303, states: “There is room also for proper recognition of usage agreed upon by merchants in trade codes.” *Id.* § 1-303 cmt. 4; see also David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV., 842, 843 (1999) (expounding the view that Llewellyn failed to fully appreciate how trade associations work).

Comment 4 also provides that “full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree.” U.C.C. § 1-303 cmt. 4. Professor Danzig uses this comment as the starting point to illustrate what he believes to be a flaw in Article 2’s vision.

Who are “commercially decent dealers”? What, at the margins, are the indices of decency and indecency? What if “decent” practices, as a judge perceives them, are not those of the “great majority,” but instead those of the dissidents? The presumption appears to be that what is “commercially decent” and what is “unconscionable,” what is “good faith” and what is bad faith, what is good law and what is bad law will be self-evident to one who carefully studies the situation. It is apparently an axiom of this approach that “good law” cannot be described for courts, but they will know it when they see it.

This approach is disturbing . . . First . . . it tends to confine the impact of the law to a reaffirmation of the predominate morals of the marketplace. Practices well below the market’s moral median may be constrained, but since the median is the standard, by definition it will be unaffected. Further, this approach seems to encourage exactly that which “realism” was supposed to discourage: a projection of a judge’s values onto the scene before him . . .

Danzig, *supra* note 120, at 629–30; see also John E. Murray, Jr., *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L.J. 1, 19–20 (1981) (replying to this view).

<sup>142</sup> U.C.C. § 1-303(a) provides:

A “course of performance” is a sequence of conduct between the parties to a particular transaction that exists if:

- (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and
- (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

U.C.C. § 1-303(a).

<sup>143</sup> U.C.C. § 1-303(b) defines “course of dealing” as “a sequence of conduct



and even qualify express terms of the parties' agreement.<sup>144</sup> In other words, the total legal obligations of the parties are to be found not only in their words, but also in the totality of the circumstances in which they do business.<sup>145</sup> Second, trade usage provides the foundation upon which the notion of merchant self-governance is constructed. Practices and methods of dealing create norms to guide the contract behavior of group members.<sup>146</sup> Of particular concern to Llewellyn was the contract chiseler whose unscrupulous conduct was believed to create an economic spiral downward to cutthroat competition and to the manufacture of shoddy merchandise. According to Article 2's vision, merchant-generated norms control the chiseler and, thus, protect the market position of the group to which he belongs.<sup>147</sup>

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concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." *Id.* § 1-303(b).

<sup>144</sup> U.C.C. § 1-201(b)(3) states in part: "Agreement" . . . means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303." *Id.* § 1-201(b)(3).

The Code distinguishes between "agreement" and "contract." U.C.C. § 1-201(b)(12) provides in part: "Contract" . . . means the total legal obligation that results from the parties' agreement." *Id.* § 1-201(b)(12).

<sup>145</sup> Professor Richard Danzig was one of the first scholars to criticize Article 2's incorporation principle, which he understood to mean that courts should find customs in the business context, and use these customs to resolve business disputes. Danzig, *supra* note 120, at 628-31; see also Schwartz, *supra* note 54, at 21-22 (arguing that Llewellyn did not intend norms of business to be controlling to resolve disputes between merchants). The debate over the principle of incorporation intensified with the publication of Professor Lisa Bernstein's article in which she concluded that "the Code's conception of widely known commercial standards and usages that are geographically coextensive with the scope of trade does not correspond to merchant reality but rather is a legal fiction whose usefulness and desirability needs to be demonstrated and defended." Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 777 (1999). See generally Jody S. Kraus & Steven D. Walt, *In Defense of the Incorporation Strategy*, in THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 193 (2000); David V. Snyder, *Language and Formalities in Commercial Contracts: A Defense of Custom and Conduct*, 54 SMU L. REV. 617 (2001).

<sup>146</sup> Professor Kamp has provided the most exhaustive treatment of the roles that Llewellyn envisioned for trade usage. See Kamp, *supra* note 102, at 347-60; Kamp, *Uptown Act*, *supra* note 120, at 281-93.

<sup>147</sup> Professor Kamp suggests that one of the principal purposes of trade norms was to control "[t]he individual at the margins [who] is neither a member of a minority group nor the non-conformist whose rights deserve the protection of the law . . . . The merchant who deviates from group standards is not the entrepreneurial hero, but the cut-throat competitor. Group norms are good; the

Trade usages, when combined with Article 2's merchant rules<sup>148</sup> and standards, such as good faith<sup>149</sup> and commercial reasonableness,<sup>150</sup> channel the exercise of freedom of contract by creating a market climate which encourages compliance with commercial norms of decency and fairness.<sup>151</sup>

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legal problem is enforcing them." *Id.* at 288.

<sup>148</sup> Article 2 contains 13 merchant rules. *See, e.g.*, U.C.C. §§ 2-201(2) (merchant exception to the Statute of Frauds), 2-205 (written assurance of a firm offer binding without consideration), 2-314(1) (warranty of merchantability is implied in contract when the seller is "a merchant with respect to goods of that kind"); *see also* Wiseman, *supra* note 120, at 503-12 (explaining the role that merchant rules play in Llewellyn's effort to create a better "merchant reality"). Professor Wiseman stated:

Llewellyn . . . did not simply try to make sales law more realistic or closer to the patterns of actual merchant transactions. Some of his rules sought to establish at least some outer bounds of unfairness between merchants in their dealings . . . In offering these provisions, Llewellyn's target was the worst of the "shapers," and his goal was to impose his vision of the fair rule for merchants.

*Id.* at 506 (footnotes omitted).

<sup>149</sup> U.C.C. § 1-201(b)(20) defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-201(b)(20). This definition is a change from former U.C.C. § 1-201(19) which defined "good faith" as "honesty in fact in the conduct or transaction concerned." *See* U.C.C. § 2-201(19) (Draft for Discussion Only 2000), available at Nat'l Conference of Comm'rs on Unif. State Laws, *Revision of Uniform Commercial Code Article 1—General Provisions*, at 3.

U.C.C. § 1-304 provides: "Every contract or duty within [the Uniform Commercial Code] imposes an obligation of good faith in its performance and enforcement." U.C.C. § 1-304; *see also* Steven J. Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981) (discussing the doctrine of good faith); Robert S. Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968) (same).

<sup>150</sup> Professor John E. Murray defends Article 2's reliance upon undefined concepts.

The overriding standards of commercial reasonableness, honesty-in-fact, conscionability and, yes, decency, are the ultimate principles which may not be overcome in any application of Article 2. . . . Article 2 not only enables but directs courts to impose their understanding of commercial morality on the market place. . . . The only alternative appears to be a commercial code based upon a mechanical jurisprudence. But a mechanical jurisprudence is unworkable . . . .

Murray, *supra* note 141, at 19-20; *see also* Kamp, *supra* note 102, at 384 (observing that the standard of reasonableness "gives courts the power to regulate the bargain and the behavior of parties to sales contracts"). *But see* Robert K. Rasmussen, *The Uneasy Case against the Uniform Commercial Code*, 62 LA. L. REV. 1097, 1100 (2002) (observing that "the vague standards of Article 2 leave so much room for differing judicial interpretations that Article 2 fails to provide similar results across jurisdictions").

<sup>151</sup> Many writers prefer the phrase "principle of private autonomy" to describe

Although Article 2's vision of market reality departs from classical theory's view of the marketplace, it does not disturb the notion that parties should determine the rights and obligations of their bargain. Trade customs are not mandated by courts or by legislatures, because they are created by the groups to which merchants belong. Although merchant rules and standards guide contract behavior during the course of doing business, they do not dictate contract content. Thus, Article 2 preserves the fundamental component of classical theory that parties have the power to determine whether to contract and to establish the terms upon which they are willing to do business.

#### *D. Limitations upon Freedom of Contract*

The drafters of Article 2 did, though, return to the common law tradition, at least to the extent that they recognized that limitations must be imposed upon free bargaining and free contract in order to preserve basic market values. Pursuant to section 1-103(b), the doctrines of fraud, duress, and undue influence supplement Article 2's provisions as do principles that grant minors and those with mental incapacities the power to avoid contract obligations.<sup>152</sup> Section 1-302(b) prohibits disclaimers of the obligations of good faith, diligence, reasonableness, and care prescribed by the Code.<sup>153</sup> Section 2-316(1) denies effect to disclaimers that are inconsistent with express warranties made by sellers.<sup>154</sup> Section 2-719(3) provides that a limitation on consequential damages for personal injuries is prima facie unconscionable in the case of consumer goods.<sup>155</sup> Without question, though, section 2-302, which introduced the doctrine of unconscionability, is Article 2's most important

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the power of individual contracting parties in sales of goods transactions. Professor Kamp has offered the following explanation for Code references to freedom of contract.

A merchant's freedom to bargain is hemmed in by "reasonableness," the standard of good faith, the use of standard terms and meanings and nondisclaimable usage of trade. . . . The UCC was proposed for adoption in the fifties, which was the worst time to mention the Code's bias against individual bargaining. Therefore, the UCC's explicit references to freedom of contract were added . . . for political reasons.

Kamp, *supra* note 102, at 395 (internal citations omitted).

<sup>152</sup> U.C.C. § 1-103(b).

<sup>153</sup> *Id.* § 1-302(b).

<sup>154</sup> *Id.* § 2-316(1).

<sup>155</sup> *Id.* § 2-719(3).

exception to the freedom of parties to contract upon such terms as they might choose.<sup>156</sup>

In the 1930s, Llewellyn explored the use of standard form contracts in sales of goods transactions to limit warranties of quality and remedies for breach.<sup>157</sup> The art of the draftsman, he noted, is "being not only used, but abused"<sup>158</sup> to create lopsided bargains which favor the drafter at the expense of the "helpless consumer."<sup>159</sup> "A bargain, however, shows itself not to be a bargain, when lop-sidedness begins to scream."<sup>160</sup> The courts' use of "covert tools"<sup>161</sup> to reach just results when the art of the draftsman has been abused must give way, he declared, to a doctrine which enables courts to candidly evaluate the fairness of contract content.<sup>162</sup> Such a doctrine, he observed, would simply reflect what experience has shown.

<sup>156</sup> *Id.* § 2-302(l). Section 208 of the RESTATEMENT (SECOND) OF CONTRACTS (1981) also recognizes the doctrine of unconscionability. The term "unconscionable" was suggested in 1942 by Hiram Thomas, a spokesman for the New York Merchant's Association. Kamp, *Uptown Act*, *supra* note 120, at 306-07.

<sup>157</sup> Llewellyn was the first scholar to explore in detail the use of standard forms with terms which favor the drafter. Llewellyn, *supra* note 100, at 393-404; Llewellyn, *supra* note 107, 731-34.

Llewellyn's most frequently quoted description of the relationship between parties who do business with standard forms was made in 1960.

I know of few "private" law problems which remotely rival the importance, economic, governmental, or "law"-legal, of the form-pad agreement; and I know of none which has been either more disturbing to life or more baffling to lawyers.

... It would be a heart-warming scene, a triumph of private attention to what is essentially private self-government in the lesser transactions of life or in those areas too specialized for the blunt, slow tools of the legislature—if only all businessmen and all their lawyers would be reasonable.

But power, like greed, if it does not always corrupt, goes easily to the head. So that the form-agreements tend either at once or over the years, and often by whole lines of trade, into a massive and almost terrifying jug-handled character; the one party lays his head into the mouth of a lion—either, and mostly, without reading the fine print, or occasionally in hope and expectation (not infrequently solid) that it will be a sweet and gentle lion.

KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362 (1960).

<sup>158</sup> Llewellyn, *supra* note 100, at 394.

<sup>159</sup> *Id.* at 404.

<sup>160</sup> *Id.* at 402.

<sup>161</sup> Llewellyn, *supra* note 107, at 703.

<sup>162</sup> "Courts' business is not the making of detailed contracts for parties; but courts' business is eminently the making out the limits of the permissible . . ." *Id.* at 704.

Folk are not, and never have been, free in our legal system to make any agreement they please enforceable . . . nor to control the courts by stating what the parties propose to and what the parties do not propose to excise from one of the accepted bargain patterns. . . . The universal principle is . . . [w]here "agreeing" insists on getting out of hand, the court and perhaps even the legislature will take a hand: perhaps a club. And even where agreements are to have effect in law, they must show sign[s] of being *agreements*, not dictation or overreaching.<sup>163</sup>

Crafting a doctrine which enabled courts to draw the line between bargains which do "outrageous work"<sup>164</sup> and those which should be enforced as made was an arduous and challenging task. Different proposals were considered by the Article 2 Drafting Committee during the 1940s.<sup>165</sup> In the end, the drafters "fudged"<sup>166</sup> and the doctrine of unconscionability was left undefined, a decision which shifted to others<sup>167</sup> the burden of determining the circumstances in which contracts, or terms

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<sup>163</sup> Llewellyn, *supra* note 100, at 403 (internal citations omitted).

<sup>164</sup> *Id.* at 394.

<sup>165</sup> See Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 489–501 (1967).

<sup>166</sup> *Id.* at 501.

Professor Leff noted that "the draftsmen failed fully to appreciate the significance of the unconscionability concept's necessary procedure-substance dichotomy and that such failure is one of the primary reasons for section 2-302's final amorphous unintelligibility and its accompanying commentary's final irrelevance." *Id.* at 488. Professor Farnsworth is more charitable. "That the term is incapable of precise definition is a source of both strength and weakness." FARNSWORTH, *supra* note 4, at 310.

However, Professor Schwartz has observed that Llewellyn did not have "the concepts and tools of modern economic analysis. Llewellyn could not understand how market power is acquired and exercised, and so his unconscionability theories are too primitive." Schwartz, *supra* note 54, at 18.

<sup>167</sup> Professor Leff is credited with developing the two prong test for finding unconscionability: procedural unconscionability ("bargaining naughtiness") and substantive unconscionability ("evils in the resulting contract"). Leff, *supra* note 165, at 487. The test found expression in the classic case of *Williams v. Walker-Thomas Furniture Co.* wherein the court declared a cross-collateral term contained in a contract signed by a buyer to be unconscionable. "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965). Although most courts continue to insist that both procedural and substantive unconscionability be present, a modest number of courts have found unconscionability based on substantive unfairness alone. See, e.g., *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 246, 254, 676 N.Y.S. 2d. 569, 574 (1st Dep't 1998).

contained therein, are lopsided and, therefore, unenforceable as made.<sup>168</sup>

### *E. Article 2 and Consumer Rights*

Although Article 2 acknowledges the need for limitations upon freedom of contract in the interests of individual contracting parties, it continues, with only limited exceptions,<sup>169</sup> the common law tradition of providing rules that make no distinction between merchant and non-merchant contracts or between consumer and merchant contracts.<sup>170</sup> Indeed, the notion of “consumer rights” is found only in a few provisions of current Article 2.<sup>171</sup> The explanation lies in the fact that Article 2’s vision was created before the consumer movement was organized and before consumer issues captured the nation’s attention. The consumer movement created a new political discourse. Its theme was the creation and enforcement of consumer rights. Llewellyn’s vision, which had its roots in the economic and social

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<sup>168</sup> The doctrine has generally been applied by courts to protect the poor and uneducated. *See, e.g.*, *Kugler v. Romain*, 279 A.2d 640, 652 (N.J. 1971) (“The need for application of the standard is most acute when the professional seller is seeking the trade of those most subject to exploitation—the uneducated, the inexperienced and the people of low incomes.”); *Jones v. Star Credit Corp.*, 59 Misc. 2d 189, 190, 298 N.Y.S.2d 264, 265 (Sup. Ct. Nassau County 1969).

On the one hand it is necessary to recognize the importance of preserving the integrity of agreements and the fundamental right of parties to deal, trade, bargain, and contract. On the other hand there is concern for the uneducated and often illiterate individual who is the victim of gross inequality of bargaining power, usually the poorest members of the community.

*Id.*; *see also* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1076–82 (1977) (expounding the view that a classification of incompetence based on poverty is over-inclusive, thus stigmatizing the poor and restricting freedom of contract).

<sup>169</sup> *See, e.g.*, U.C.C. §§ 2-502(1)(a), 2-716(3), 2-719(3) (2003); *see also supra* note 148 and accompanying text.

<sup>170</sup> Professor Rubin has criticized the drafters’ decision to follow the common law tradition:

The entire framework of the UCC is based on common law. While it is obviously a statute, and may even claim to be a code, it relies heavily upon the common-law models. Sometimes it follows these models slavishly, and sometimes it modifies them creatively, but common law has remained at the foundation of the vast majority of the Code’s provisions. As a result, the Code inherits the common law’s blindness to consumer concerns, the very blindness which led directly to the law reform efforts of the consumer movement.

Rubin, *supra* note 21, at 13–14.

<sup>171</sup> *See* U.C.C. §§ 2-318, 2-502(1)(a), 2-716(3), 2-719(3).

theories that existed in the 1930s, focused on the notion of working groups empowered to establish norms to control the behavior of their members and on the creation of a business commonwealth.<sup>172</sup> Professor Allen Kamp explained:

Llewellyn's vision was different from today's "rights talk." Whereas rights advocates view society in terms of powerless individuals who are oppressed and exploited by powerful institutions, Llewellyn . . . and the believers in the business commonwealth saw society as working groups engaged in commerce. Moreover, in as much as consumer groups want to empower consumers individually, Llewellyn wanted to empower merchants collectively. Thus, part of the explanation for the forgetfulness of the past is that academic trends have changed.<sup>173</sup>

Within a decade after the Code was enacted by state legislatures, tension between consumers and merchants intensified. Article 2's vision was declared to be obsolete, at least to the extent that it failed to acknowledge that the economic welfare of all consumers was at risk and, thus, to provide protection for fundamental consumer rights.<sup>174</sup> The consumer movement had emerged, its influence so powerful that opposition to proposed reform measures "counted for virtually nothing."<sup>175</sup> The role of government to secure fairness in contract relationships between merchants and consumers was on the verge of unprecedented growth and expansion.

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<sup>172</sup> See *Kamp*, *supra* note 102, at 382-83. "The UCC keeps the dream of the business commonwealth, with each trade regulating its own affairs, alive." *Id.* at 383.

<sup>173</sup> *Id.* at 392-93 (internal citations omitted).

<sup>174</sup> See, e.g., Egon Guttman, *U.C.C. D.O.A. Le Roi Est Mort, Vive Le Roi*, 26 LOY. L.A. L. REV. 625, 635 (1993) (observing that "the UCC never provided a real base for consumer protection"); Addison Mueller, *Contracts of Frustration*, 78 YALE L.J. 576, 597 (1969) (stating that "the law's long-standing indifference to the consumer's interest in sales transactions can no longer be tolerated"); Rubin, *supra* note 21, at 12 ("As is generally known, the Uniform Commercial Code . . . has not been kind to consumers.").

<sup>175</sup> Edward L. Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233, 266 (1991).

## IV. THE CONSUMER MOVEMENT

A. *Consumer Grievances and the Demand for Government Action*

The consumer movement gained momentum during the late 1960s, fueled by the willingness of politicians, the media, and consumer groups to campaign for economic reform measures.<sup>176</sup> The purpose of the movement was to identify injustices suffered by consumers in the marketplace and to lobby state legislatures and Congress for protection laws. The consumers' plight was bleak, especially for the nation's poor.<sup>177</sup> Congressional hearings exposed fraud and deception in consumer loans, leases, and credit sales. Testimony from witnesses, including consumers and representatives from legal service organizations, suggested that the poor paid higher cash prices and higher finance charges for goods and services than did members of the middle class who were believed to have access to merchants offering more favorable prices and terms.<sup>178</sup> Credit transactions in poverty areas were "marked by ignorance on the part of the buyer, enticement, the bait of easy terms, fraudulent practices, shoddy merchandise, unreliable dealers, garnishment, and oppressive collection methods."<sup>179</sup> Warnings that regulatory measures would benefit some at the expense of individual choice for others faded into the background as legislatures chose to experiment in response to consumers' complaints about economic abuses in the credit industry.<sup>180</sup> In 1968, Congress enacted the Truth-in-

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<sup>176</sup> See Kripke, *supra* note 43, at 1-3 (noting the enthusiasm of journalists, politicians and consumer groups for a federal truth-in-lending bill); see also Rubin, *supra* note 175, at 265 (noting that the truth-in-lending bill slumbered in committee until 1966 when "a Congress was elected with a perceived mandate to enact consumer protection legislation").

<sup>177</sup> See, e.g., Mary Gardiner Jones & Barry B. Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 360-61 (1972); Kripke, *supra* note 43; Note, *Consumer Legislation and the Poor*, 76 YALE. L.J. 745, 745-46 (1967); Symposium, *Consumer Protection and the Urban Poor*, 37 GEO. WASH. L. REV. 1013 (1969); Comment, *Translating Sympathy for Deceived Consumers Into Effective Programs for Protection*, 114 U. PA. L. REV. 395, 409-10 (1966).

<sup>178</sup> Kripke, *supra* note 43, at 2-17.

<sup>179</sup> *Id.* at 4.

<sup>180</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* 162 (1961) ("In most cases the law provides benefits for one class of the population only at the cost of depriving others of what they prefer."); Patrick Atiyah, *Contracts, Promises and the Law of Obligations*, 94 L.Q. REV. 193, 218 (1978) ("To strike down, or limit the binding



Lending Act,<sup>181</sup> and the NCCUSL promulgated the Uniform Consumer Credit Code<sup>182</sup> for adoption by the states. A decade of legislative experimentation in modern consumer protection had begun and confidence that government could protect consumers' interests soared.

Of course, injustices did not visit the poor alone. Conditions in most, if not all, consumer markets continued to deteriorate. There was widespread agreement that consumers suffered not only from disparity in bargaining power, but also from imperfect information about the products they purchased and the terms upon which these purchases were made.<sup>183</sup> Modern consumer

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force of executory contracts in order to protect some people from their own folly or ignorance is, by contrast, a redistributive device, and like all such devices must impose costs as well as benefits."); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV., 697, 715 (1990) ("While one extreme tends to mean freedom for the rich, powerful, informed, and shrewd at the expense of the poor, weak, ignorant, and naive, the other threatens the idea of some role for individual choice.").

<sup>181</sup> 15 U.S.C. §§ 1601–1665 (2000). The Act requires a creditor to disclose any finance charge as an annual percentage rate. *See id.* §§ 1605(a), 1606(a). *See generally* Rubin, *supra* note 175, at 242–63 (discussing the eight-year drafting process). Professor Rubin observed that "efforts to determine the statute's actual effects were largely limited to speculation." *Id.* at 300.

<sup>182</sup> The UCCC was promulgated by the NCCUSL in 1968. Its principal purpose was to provide a comprehensive and all-inclusive regulatory model to replace existing state laws governing consumer credit sales and consumer loans. The 1968 Code was criticized for its failure to provide adequate consumer protection. *See, e.g.,* J. Barry Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U. L. REV. 53 (1969); *see also* Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 125 (1993) (observing that the Uniform Commercial Code may be considered the NCCUSL's "greatest success" but that the UCCC, "its most 'pro-consumer' piece of legislation, was at least from the standpoint of state enactment, largely a failure.").

<sup>183</sup> Richard Barber has described the plight of the consumer as follows:

In contrast to producers (and the Government itself), who are armed with information and who are otherwise able to make informed, rational decisions, the individual buyer, who is besieged by advertising, deceived by packages, confronted with an expanding range of highly complex goods, limited in time, and exhausted by a trek along the aisles of a supermarket, is simply not qualified to buy discriminately and wisely.

Barber, *supra* note 42, at 1204. *See generally* Frank R. Kennedy, *Foreword to Symposium on Consumer Protection*, 64 MICH. L. REV. 1197, 1197–98 (1966) (discussing the lack of information available to consumers about product quality, availability, and prices).

Some commentators concluded that imperfect information results in contract terms that favor the drafter, thus prompting the need for government regulation. *See, e.g.,* Jeffrey Davis, *Revamping Consumer Credit Contract Law*, 68 VA. L. REV. 1333 (1982); Rakoff, *supra* note 11, at 1224; *see also* Alan Schwartz & Louis J.

markets were far removed from classical contract theory's vision, which assumed equal bargaining power and perfect knowledge of relevant market conditions. Existing legislative measures that required disclosure of information were severely limited in scope and coverage and, therefore, of little use to purchasers who encountered a vast array of new products and services.<sup>184</sup> Informed consumer decision-making did not occur in the marketplace. The conclusion seemed inescapable that deviations from the vision of equal parties caused loss to all consumers who did not contract upon terms which favored their interests and who did not receive the best products and services available at the lowest possible prices. Consumers needed more comprehensive governmental programs, which ensured the dissemination of reliable and complete information, to enable them to comparison shop.<sup>185</sup>

Article 2 did not escape criticism. It did not address some issues, such as warranty obligations from sellers to remote buyers.<sup>186</sup> Nor did the Article always capture unscrupulous merchant behavior. Consumers complained that warranty descriptions, which accompanied the products that they purchased, confused and deceived them.<sup>187</sup> In 1975, Congress enacted the Magnuson-Moss Warranty Act,<sup>188</sup> a statute which relied principally upon disclosure to remedy consumers' grievances. Many state legislatures adopted lemon laws in response to complaints that automobile dealers failed to remedy

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Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1388-89 (1983) (explaining the view that these authors fail to appreciate different forms of imperfect information and how, if at all, these forms affect contract content).

<sup>184</sup> Barber, *supra* note 42, at 1207-17.

<sup>185</sup> See Kennedy, *supra* note 183, at 1197-98 (noting agreement among the symposium participants that government should assume a larger role in providing the consumer "the protection to which he is entitled"). See generally *Consumer Protection Symposium*, 29 OHIO ST. L.J. 593 (1968).

<sup>186</sup> See generally Donald F. Clifford, *Express Warranty Liability of Remote Sellers: One Purchase, Two Relationships*, 75 WASH. U. L.Q. 413 (1997); Curtis R. Reitz, *Manufacturers' Warranties of Consumer Goods*, 75 WASH. U. L.Q. 357 (1997).

<sup>187</sup> See Brickey, *supra* note 5, at 73-77 (outlining the complaints which prompted Congress to enact warranty protection legislation); see also Mueller, *supra* note 174, at 576 (noting the presence of shoddy and defective merchandise in the marketplace and the difficulties consumers encountered in obtaining repairs or replacements).

<sup>188</sup> 15 U.S.C. §§ 2301-2312 (2000); see also SHELTON & CARTER, *supra* note 5, §§ 2.1.1-9.2 (providing a comprehensive treatment of the Act's provisions).

defects in new cars.<sup>189</sup> These laws made only modest inroads upon the doctrine of freedom of contract as defined by Article 2. By 1970, most sellers relied upon the standard form contract to do business with consumers.<sup>190</sup> Consumers were not expected to read or to understand the terms contained in these contracts.<sup>191</sup> Consumers who did read these contracts did not have bargaining power to negotiate warranty terms and remedies for breach of these terms.<sup>192</sup> Thus, sellers took advantage of the Article's provisions, which insist that parties may choose the terms of their bargain, to impose limited warranty obligations<sup>193</sup> and limited remedies<sup>194</sup> upon unsuspecting and powerless buyers. Lopsided bargains were believed to be the rule, not the exception, in sales of goods transactions between merchants and consumers.

Although the doctrine of unconscionability was only in its infancy, some scholars concluded that it failed to provide an effective weapon to challenge unfair terms contained in standard forms. Critics charged that the procedural and substantive elements of the doctrine were difficult to satisfy, except in the most extraordinary circumstances, and that those who were able to meet the doctrine's requirements, namely the poor and

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<sup>189</sup> The first lemon law was enacted in Connecticut in 1982. See Vogel, *supra* note 5, at 590 n.3 (stating that when the Connecticut state legislature conducted hearings on a proposed lemon law, hundreds of consumers who had purchased defective new cars attended the hearings and testified in favor of the bill). Today, all states and the District of Columbia have some form of this law. See SHELTON & CARTER, *supra* note 5, §§ 13.1–18.9 (outlining state variations and discussing consumer rights and remedies under these laws).

<sup>190</sup> See Slawson, *supra* note 11, at 529 (stating that standard contracts "probably account for more than ninety-nine percent of all the contracts now made").

<sup>191</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (1981); see also Eisenberg, *supra* note 54, at 240–43 (1995).

<sup>192</sup> There is substantial agreement that even if consumers read and understand disclaimers and limitation of remedies clauses, they do not have bargaining power to change them. See, e.g., Mueller, *supra* note 174, at 580–81; Rakoff, *supra* note 11, at 1225.

<sup>193</sup> U.C.C. § 2-316(2)–(3) (2003) (providing that the implied warranties of merchantability and fitness for a particular purpose may be modified or disclaimed and setting forth the requirements for effective disclaimers); see also SHELTON & CARTER, *supra* note 5, §§ 2.1.1–9.2 (analyzing the relationship between section 2-316 and the Magnuson-Moss Warranty Act).

<sup>194</sup> U.C.C. § 2-719(1)–(2) (2003) (providing that the parties may by agreement limit a buyer's remedies for breach but that if the circumstances cause an exclusive remedy to fail of its essential purpose, Code remedies are available).

uneducated, could not afford a lawyer.<sup>195</sup> Thus, as a practical matter, most consumers had no legal tools to challenge the enforcement of standard terms that favored the drafter unless fraud, duress, or undue influence existed in the bargaining process.<sup>196</sup>

### B. *The Controversy Emerges*

Although legislative measures designed to protect the economic welfare of consumers multiplied in number, consumers insisted that merchants continued to engage in unscrupulous contract practices. Scholars began to explore in earnest the reasons why fairness appeared not to have been achieved in consumer goods and service transactions. The proposition, unquestioned for decades, that inequalities enable business to perpetrate injustices came under increasing scrutiny.<sup>197</sup> Some

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<sup>195</sup> See, e.g., Jean Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 B.U. L. REV. 349, 396 (1988) ("A statute that gives private individuals the right to sue under a vague standard like unconscionability or unfairness is the paradigm of ineffective consumer protection legislation."); Leff, *supra* note 11, at 357 ("Wouldn't more be changed by explicit positive law, administratively interpreted and enforced, than by the feed-back from easily distinguishable, easily stallable, exceedingly expensive cases?").

<sup>196</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (providing that "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement"). This provision has been used in only a limited number of jurisdictions. See James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L.Q. 315, 320-46 (1997).

It is not surprising that debate emerged over whether government is well-suited to decide the fairness or reasonableness of contract terms. Compare Arthur A. Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 155-56 (1970) (noting the difficulties in determining when and how to regulate the "quality" of contract terms) with Rakoff, *supra* note 11, at 1238 ("If government is at all legitimate, it is legitimate for the purpose of framing generally applicable legal rules. That cannot be said of the form draftsman.").

<sup>197</sup> See Lawrence, *supra* note 8, at 815-17 (exploring the views that identify different causes of consumer grievances); see also Eisenberg, *supra* note 54 (discussing the doctrine of unequal bargaining power and its usefulness as a guide in determining the enforceability of contracts or terms contained therein); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (same). One writer noted:

[T]he laissez-faire metaphor remains central to the way the law approaches standard form contracts. The courts continue to investigate the actions and the agreement of the parties before them, even though the Uniform Commercial Code admonishes the judiciary to examine the "commercial setting, purpose, and effect" of the agreement. This judicial

commentators, for example, attributed the sale of shoddy merchandise and the use of terms oppressive to the lack of competition in certain sectors of the economy. Accordingly, the solution to the consumers' plight was to increase competition among merchants who did business in these markets. Merchants who did not offer higher quality products and adequate warranty protection would inevitably lose their market positions.<sup>198</sup> This view fueled doubt that existing consumer laws, which assume that abuses are fostered by deviations from equality, address the causes of the consumers' plight. Other writers, however, continued to insist that injustices could be traced to the loss of consumer bargaining power and to imperfect information.<sup>199</sup>

These writers also concluded that existing measures had failed to achieve fairness in consumer transactions. A number of reasons were offered to explain this failure. First, protection laws were limited in scope and coverage and, therefore, did not address many of the evils which consumers encountered in the marketplace.<sup>200</sup> Second, some state legislatures had resisted demands for reform and, thus, protection varied widely from state to state.<sup>201</sup> Third, legislatures had failed to provide

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emphasis on the bargaining process between the immediate parties to a contract may be misdirected. More significantly, legislative reliance on judicial resolutions of the problems prompting such inquiries may be unwarranted.

Kornhauser, *supra* note 33, at 1154.

<sup>198</sup> See Murray, *supra* note 22, at 1498-99 (noting the changes in automobile warranties to benefit consumers). Professor Murray concluded that the "total consumer protection legislation in America has not caused this change. The cause was something called competition—essentially competition from the Japanese. The quality of American automobiles has improved substantially because of this competition and not because of our legislation." *Id.*; see also Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 678-79 (1979) (arguing that it is better to increase competition than to regulate prices or prohibit the use of certain terms).

<sup>199</sup> See, e.g., Lawrence, *supra* note 8, at 851-52 (stating that an agency responsible for administering a mandatory disclosure system is necessary to protect consumers).

<sup>200</sup> See Task Force of the A.B.A., *supra* note 10, at 1003-04 (describing the limitations of existing protection laws which supplement Article 2).

<sup>201</sup> The lessons learned from the enactment process of Article 2A (Leases) have been especially troubling. Professor Miller noted:

[T]he Article 2A consumer provisions were not uniformly accepted in the enactment process: some were dropped, some were changed, and some additional ones were added. Moreover, in several states Article 2A was stalled for a time or has not been enacted because its modest approach is

solutions that would eradicate identified evils. Substantial agreement existed, for example, that disclosure as mandated by the Truth-in-Lending Act did not remedy abuses suffered by the poor who are unable to obtain credit from merchants who offer more favorable terms.<sup>202</sup> Finally, efforts to establish affordable and efficient procedural mechanisms for enforcing existing rights were in their infancy and, thus, sellers and manufacturers were "in practical effect immune from the sanctions of the present legal structure with respect to some claims which might be brought against them."<sup>203</sup>

Equally, if not more troubling, was the conclusion drawn by critics that protection laws are neither necessary nor desirable. They claimed that consumer measures rely upon the proposition that members of the consumer class are not able to maximize their expected utilities, a proposition unsupported by reliable empirical evidence.<sup>204</sup> They also charged that such laws are

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viewed as too modest. In some states, only when a separate consumer leasing act was also agreed upon or enacted was Article 2A passed into law.

Miller, *supra* note 14, at 194–95.

<sup>202</sup> Several commentators have criticized the Truth-in-Lending Act. See Kripke, *supra* note 43, at 2–13; Rubin, *supra* note 175, at 276–81.

The Magnuson-Moss Warranty Act has also been criticized for its failure to provide effective warranty protection to consumers. See generally Brickey, *supra* note 5. But see Robert A. Riegert, *An Overview of the Magnuson-Moss Warranty Act and the Successful Consumer Plaintiff's Right to Attorney's Fees*, 95 COM. L.J. 468, 484 (1990) (observing that the Act "substantially improves the net effect of warranties given to consumers . . . by giving consumers additional rights and remedies without disturbing those the consumer originally had.").

Lemon laws have also been criticized. See Carol S. Nance, *Virginia's Lemon Law: The Best Treatment for Car Owner's Canker?*, 19 U. RICH. L. REV. 405, 423–25 (1985); Vogel, *supra* note 5, at 615–66. But see Julian B. Bell III, Comment, *Ohio's Lemon Law: Ohio Joins the Rest of the Nation in Waging War Against the Automobile Limited Warranty*, 57 U. CIN. L. REV. 1015 (1988).

<sup>203</sup> Mary Gardiner Jones & Barry B. Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357, 361 (1972).

<sup>204</sup> Professor Schwartz has observed:

It is now commonly assumed that many people, in particular the poor, cannot competently maximize their utility, because these people are ignorant, inexperienced, or simply bad at making their preferences and purchases congruent. Even though some people are poor at maximizing their own utility, the issue is whether the law should presume that, as a general rule, consumers act competently. The traditional premise of consumer competence . . . should continue to govern, because the evidence of widespread incompetence is too unreliable to justify the costs of assuming that some consumers cannot act in their own best interests.

undesirable because they benefit only those who obtain legal redress for their grievances while producing adverse consequences for others. It was feared, for example, that sellers would pass the costs of government regulation on to the market in the form of higher prices. Consumers would be forced to pay these prices or do without the products.<sup>205</sup> It was also feared

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Schwartz, *supra* note 168, at 1076-77 (citation omitted); see also Fred H. Miller, *Consumer Issues and the Revision of U.C.C. Article 2*, 35 WM. & MARY L. REV. 1565, 1565 n.1 (1994) (stating that most consumers are "more sophisticated and better educated" than standard learning suggests); White, *supra* note 196, at 356 (observing that consumers are "smarter, more cunning, and far less honest than their advocates make them out to be").

<sup>205</sup> Industry opposition to special consumer measures was based upon predictions of dire adverse consequences. In 1963, a representative of the National Association of Manufacturers made the following statement before a U.S. Senate subcommittee considering a truth-in-packaging bill:

The effect of this bill, if enacted, will flow into hundreds of communities in every State, influencing the commerce and industry, the payrolls, and the economies of those places.

The jobs of designers, artists, engineers, molders of glass and plastic, steel and tinplate workers, machinery workers, and employees in paper mills, printing plants, advertising agencies, and many others will be regulated or jeopardized by this bill.

In one way or another you may expect a disruption of these enterprises, their employees, their suppliers, their investors, and the smaller services which surround them. . . .

The inevitable effect of the bill will be to roll back the packaging and marketing revolution of this generation. Had we lived in recent years under such a law, we would not buy our products as fresh, as clean, as unbroken or unspoiled, as accurately measured, as easily handled or as cheaply as we do today.

Hart, *supra* note 105, at 1263 (quoting *Hearings on Packaging and Labeling Legislation before the Senate Subcommittee on Antitrust and Monopoly*, 88th Cong. (1963)).

Professor Farber has illustrated this point, using the classic case of *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 447-48 (D.C. Cir. 1965), in which the court invalidated a cross-collateral provision contained in a finance agreement on the grounds that it was unconscionable.

Under the ex ante approach . . . the court's decision is troubling. The future effect of the decision is to reduce a seller's collateral and the buyer's incentive to scrape up the payments. Consequently, the debt becomes more risky. To counter this increased risk, sellers will either have to raise interest rates or refuse to lend to the riskier buyers. So the cost of taking this particular buyer off the hook is that similar individuals in the future will be hurt in one of two ways: They may be unable to buy furniture at all, which seems a doubtful contribution to their well being, or they may have to pay higher interest. At best we have forced them to exchange a package of lower interest but strict collection practices, for another package with higher rates but less repossession. Either way, the effect of the decision is to harm future buyers. . . . From this ex ante perspective, the court's

that such measures would create uncertainty over the enforceability of consumer promises, thus hampering market efficiency by making it more difficult for merchants to plan for the future.<sup>206</sup> Some skeptics who adopted this line of thought rejected the view that legislatures should engage in experimentation. They believed that limitations upon freedom of contract in the interests of individual contracting parties always impose costs, even for those whom the law is intended to benefit. In the end, legislatures must choose between competing interests, and the choice to benefit a few at the expense of others was a practice thought to be unwarranted and foolhardy.<sup>207</sup>

Within the span of a decade, the issues surrounding government regulation, and particularly consumer protection, had become extraordinarily complex. Issues deserving of further study had been added to those identified by Learned Hand in 1908, but answers to all of these questions remained elusive. There was no question, however, that confidence in government regulation eroded as claims mounted that protective laws were ineffective and unwise. Consumer protection had become controversial. Not unsurprisingly, neither consumer advocates nor skeptics could prove with certainty the truth or falsity of their respective claims. Only modest efforts were made by scholars to gather data to establish the causes of consumer grievances, the scope of the consumers' plight, and the effects of existing protection laws.<sup>208</sup> Moreover, legislatures had not

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decision is not only inefficient but perverse, because it harms the very group it is intended to help.

Farber, *supra* note 134, at 57–58; see also Schwartz, *supra* note 168, at 1057–58 (stating that a prohibition against disclaimers “yields a nonoptimal result: some buyers regard themselves as worse off than before the ban, and no buyers regard themselves as better off”).

<sup>206</sup> See Lawrence, *supra* note 8, at 836 (noting the use of this argument by opponents of government regulation). Critics also believed that regulation limits the flexibility needed by certain businesses to adjust to new circumstances.

[Legislation] has a serious disadvantage. It does away with flexibility without which only a few trades can do. It enlarges the business man's risk and does not allow him to take measures against its increase, measures which only he can devise and which must be applied rapidly. Legislative compulsion works best where a trade has grown into a quasi-governmental function, as *e.g.*, insurance or traffic; it is almost impossible in all other branches.

OTTO PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* 145 (1937).

<sup>207</sup> See, *e.g.*, White, *supra* note 196, at 355–56.

<sup>208</sup> Some commentators have questioned whether the total results of legislation



created mechanisms to measure the total results of their experiments.<sup>209</sup> Thus, the wisdom of consumer measures remained uncertain. By the early 1980s, legislatures were less inclined to act on consumers' behalf.<sup>210</sup> Indeed the pendulum appeared to be swinging in favor of less intrusive control of economic life in this country.<sup>211</sup> Consumers, however, continued to claim that market conditions provided evidence that bargains as made did not maximize utilities of consumer buyers and that legislative measures were woefully inadequate to resolve their grievances. Indeed, judicial decisions appeared to highlight the gap between existing legislative enactments and market realities.<sup>212</sup> Although some issues had troubled courts for

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that restricts freedom of contract can be measured at all. See Edwin W. Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731, 746 (1943). Others doubt that comprehensive efforts to measure consequences will ever be made. See Kennedy, *supra* note 197, at 603; John E. Bryson & Stephen S. Dunham, Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618, 619 n.6 (1969) (noting that the number of general discussions of problems raised by consumer credit far exceeds the number of empirical studies undertaken). But see Rubin, *supra* note 175, at 235-36 (observing that a number of empirical studies to determine the effects of the Truth-in-Lending Act were conducted after the Act was passed).

<sup>209</sup> See Rubin, *supra* note 175, at 299-306 (discussing ways in which legislatures could gather data to determine the results of protection laws).

<sup>210</sup> By 1980, the consumer movement had lost its momentum.

Since the late 1970s, a reaction to the consumer protection movement has been building. The rise of law and economics in the late 1970s has presaged a political and ideological reaction to the governmental intervention of the 1960s and early 1970s. Freedom from governmental intervention has been the rage since the 1980s.

Woodward, *supra* note 7, at 245-46.

<sup>211</sup> See Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1329 (1998) (discussing the changes that have occurred during the last twenty-five years in the regulation of transportation, telecommunications and energy industries and suggesting that these changes emphasize "to the maximum degree feasible, consumer choice among multiple competing providers").

<sup>212</sup> As legislatures became reluctant to act on consumers' behalf, consumers turned to the courts to seek redress for their grievances.

[A]lthough the language of the current Article 2 is consumer neutral, the case law is not. Consumer cases have played an important role in the development of Article 2 case law involving warranties and remedies for breach of warranties. . . . In the early days of the Code, the pressures started on disclaimer issues; it was some years before failure of essential purpose was reached. But consumers got there, and the law continues to bear their mark.

Task Force of the A.B.A., *supra* note 10, at 1002; see also SHELTON & CARTER, *supra* note 5, §§ 5.1-15.3 (outlining the grounds upon which consumers have claimed that

decades, others were new.<sup>213</sup> It is not surprising that the recommendation of the NCCUSL and the ALI that Article 2 should be revised appeared to re-energize consumers.

## V. ARTICLE 2 AND THE UNIFORM LAW PROCESS

### A. *Article 2 and Consumer Protection*

The Article 2 Drafting Committee began work in 1992. The reporter, Richard E. Speidel, predicted that the Committee would complete revisions of Article 2 in 1996.<sup>214</sup> Two events, however, caused lengthy delays. First, the Drafting Committee struggled for several years to incorporate contracts involving computer software and data into the scope of Article 2. In 1995, the Committee concluded that a successful accommodation of contract law and intellectual property law could not be achieved in Article 2 and subsequently abandoned its efforts to broaden the scope of the Article. A separate committee was formed by the sponsoring organizations to draft Article 2B to govern computer information transactions, but doubts regarding the merits and enactability of Article 2B emerged. In 1999, the ALI withdrew its sponsorship. The NCCUSL, as sole sponsor, gave

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warranty disclaimers are ineffective), 9.1–11 (discussing consumer challenges to limitation of remedy clauses).

<sup>213</sup> One of the most troublesome issues is the enforceability of terms contained in or on a package in which the goods are delivered. The Article 2 Drafting Committee, appointed in 1999, declined to treat the issue. Comment 5 to the proposed amended section 2-207 states in part:

[This] Article . . . takes no position on whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to these cases; the “rolling contract” is not made until acceptance of the seller’s terms after the goods and terms are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (contract is made at time of oral or other bargain and “shrink wrap” terms or those in the container become part of the contract only if they comply with provisions such as are contained in Section 2-207).

U.C.C. § 2-207 cmt. 5 (2003).

<sup>214</sup> Richard E. Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1306 n.4 (1994).

Representatives of consumer organizations were not invited to be members of the drafting committees. However, they did participate as observers. Michael M. Greenfield, *The Role of Assent in Article 2 and Article 9*, 75 WASH. U. L.Q. 289, 294–95 (1997).

the provisions of the failed Article 2B new life as the Uniform Consumer Information Transactions Act (UCITA).<sup>215</sup>

The Article 2 Drafting Committee then turned its attention to the question of whether additional consumer protections should be included within Article 2. This question triggered intense debate among all revision participants, and attempts to reach consensus prolonged the drafting process.<sup>216</sup> The Study Group appointed by the Permanent Editorial Board for the Uniform Commercial Code had not provided a clear sense of direction, recommending that Article 2 retain its essentially neutral position on consumer protection, while conceding that the matter was deserving of further study.<sup>217</sup> Thus, the

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<sup>215</sup> *Article 2B Is Withdrawn from the UCC and Will Be Promulgated by NCCUSL as a Separate Act*, A.L.I. REP. (Spring 1999), available at <http://www.ali-aba.org/ali/r2103-art2b.htm>. On April 7, 1999, the NCCUSL and the ALI announced that Article 2B would not be included in the Code and that the NCCUSL would promulgate its provisions as the Uniform Consumer Information Transactions Act (UCITA). *Id.* However, only Maryland and Virginia have enacted the UCITA. Scott, *supra* note 23, at 1050.

Professor Scott provided a complete discussion of the controversy which surrounds UCITA and the difficulties encountered throughout the uniform law process in determining whether and to what extent transactions that include both the sale of goods and the transfer of rights in information should be included within the scope of Article 2. *See* Scott, *supra* note 23, at 1047–53.

<sup>216</sup> *See generally* Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTINGS L.J. 607 (2001).

<sup>217</sup> In 1990, the Permanent Editorial Board Study Group on Article 2 of the Uniform Commercial Code issued its Preliminary Report which identified a number of problems with current Article 2. Comments on the Report were solicited and received by the Study Group. The Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title was critical of the Preliminary Report in large measure because of the Report's failure to recommend treatment of important consumer issues within Article 2. *See* Task Force of the A.B.A., *supra* note 10, at 1000–09.

The Study Group issued an Executive Summary as a result of comments it received from the public. The Executive Summary recommended that Article 2 be revised and that a drafting committee be appointed. *See PEB Study Group: Uniform Commercial Code, Article 2 Executive Summary*, 46 BUS. LAW. 1869, 1876 (1991). The Study Group also suggested that Article 2 continue its “relatively neutral approach” on consumer protection. *Id.* “The reasons include the notion that Article 2 is, primarily, a commercial statute, the fact that the history of consumer protection law reflects local, non-uniform development, and the belief that a more inclusive approach would impair the chances for approval and ultimate adoption of any revised Article 2.” *Id.* However, the Study Group did concede that some new special consumer measures might be desirable additions to Article 2 and recommended that further study of federal and state consumer developments be undertaken. *Id.* at 1878. Drafts produced by the two Drafting Committees are available at <http://www.nccusl.org>.

committee was left with the difficult task of charting a course between those who believed that fairness in contract relationships would be achieved through a combination of regulation and freedom of contract, and those who insisted that the consumer class and the community would be better served by unregulated market forces.<sup>218</sup>

Article 2's doctrine of freedom of contract was at stake. Consumers continued to point to the gap between contract theory and contract practice, arguing that the addition of special, non-variable consumer laws within Article 2 would fill the gaps in existing legislation and ensure uniform treatment of consumer issues in every state.<sup>219</sup> Other revision participants concluded that protection laws should continue to develop as a separate body of law that supplements Article 2's provisions. This conclusion was based, at least in part, on the concern that skeptics would resurrect doubts about the wisdom of consumer proposals, triggering debate between consumers and commercial interests. Fred Miller pleaded for restraint in making revisions until all groups could come to a consensus regarding the appropriateness of making changes. In Miller's view, such a

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<sup>218</sup> See generally Braucher, *supra* note 195 (considering different versions of the notion of "freedom of contract"); Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598 (1969) (discussing the increased emphasis on freedom of contract in the RESTATEMENT (SECOND) OF CONTRACTS); Harry W. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43 (1975) (examining the conflict between freedom of contract as a public value and the public interest in commercial fairness and socially beneficial economic arrangements).

<sup>219</sup> The first Drafting Committee explained its decision to include additional special consumer provisions as follows:

Although we have not done a systematic study, it is clear that consumer protection laws among the states vary in scope and coverage. There is no uniformity here. Some states have little or no consumer protection legislation while others have comprehensive legislation. Moreover, there frequently are gaps between federal law and state law in particular areas, such as consumer warranties. The risk is that litigation will arise in states with weak consumer protection laws or that stronger parties will select that law through choice of clauses. Article 2, then, is justified in providing some consumer protection rules to fill the gaps.

Greenfield & Rusch, *supra* note 11, at 138 (quoting U.C.C. § 2-105 n.3 (Revision Draft 1998)); see also James J. White, *Comments at 1997 AALS Annual Meeting: Consumer Protection and the Uniform Commercial Code*, 75 WASH. U. L.Q. 219, 219 (1975) (stating that consumer advocates would argue that protection laws are efficient "because, given the choice, consumers would pay for those consumer rights as a form of insurance against unfair treatment upon default. Therefore[,] . . . the law will better fit what consumers would really want if they could bargain for it.").

consensus would ensure both approval by the sponsoring organizations and uniform enactment by the states.<sup>220</sup>

In the early 1990s, consumers had reason to be optimistic. Committee drafts addressed important consumer issues, including the disclaimer of implied warranties and obligations from sellers to remote buyers.<sup>221</sup> Proposed section 2-206,<sup>222</sup>

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<sup>220</sup> See Miller, *supra* note 14, at 215 (giving reasons why all parties benefit from uniform enactment). But see Gail Hillebrand, *What's Wrong With The Uniform Law Process*, 52 HASTINGS L.J. 631, 631 (2001) ("There's too much emphasis in the uniform laws process on enactability at the expense of good policy.").

Some scholars concluded that nonvariable provisions designed to protect consumers are inconsistent with Article 2's vision. Professor Scott has stated:

In a world that focuses on "rights," the normative objectives of filling gaps with efficient defaults and regulating unbalanced bargains are fundamentally in conflict. It is unsurprising, therefore, that a single statutory scheme can no longer accommodate both objectives without stimulating value conflicts that the private legislative process is ill suited to resolve.

Scott, *supra* note 23, at 1054.

<sup>221</sup> See Richard E. Speidel, *Introduction to Symposium on Proposed Article 2*, 54 SMU L. REV. 787, 792 n.2 (2001) ("For historical reference, the high water mark for consumers was the November, 1996 draft prepared for the Council of the American Law Institute."); see also Hillebrand, *supra* note 20, at 93-108 (discussing consumer provisions contained in Article 2 Committee drafts through January 1997). Ms. Hillebrand points out that the Drafting Committee did not always meet consumers' expectations. *Id.* at 101-04. For example, consumer advocates had hoped that disclaimers of implied warranties would be prohibited in consumer contracts. *Id.* The Drafting Committee chose to permit disclaimers in consumer contracts and, as a result of the need to reach consensus, diluted the standards for effective disclaimers. *Id.*

In 1996, the Executive Committee of the NCCUSL recommended that a number of special consumer provisions be included within Article 2. Examples included provisions to enable consumers to challenge the enforceability of standard contract terms, to require that a disclaimer of implied warranties be in a record and that a seller carry the burden of proof that a consumer buyer expressly agreed to it, and to provide more protection to consumers in the event a limited remedy fails of its essential purpose. These recommendations did not include the award of attorney's fees and costs to consumers who prevailed against sellers. See Miller, *supra* note 14, at 201-02.

<sup>222</sup> Richard Speidel explained the need for the section as follows:

Concededly, the market over time provides some balance in the content of standard terms, and other factors, such as reputation, may induce strong sellers to adopt buyer friendly practices. But not every seller responds or is responsible and, if there are market failures, Article 2 as administered by the courts is of little help.

Speidel, *supra* note 216, at 615.

Proposed section 2-206 was rewritten a number of times. One version, section 2-206(b) of the January 4, 1996 (Sales) draft, stated:

A term in a standard form to which a consumer has manifested assent by conduct or by signing the standard form is not part of the contract if the

which created a new standard to challenge the enforceability of terms contained in form contracts, fueled consumers' optimism. Nevertheless, opposition to all proposals put forward by consumers intensified.<sup>223</sup> Some proposals, most notably section 2-206, were rewritten a number of times in an attempt to reach consensus among Committee members, consumers, and industry representatives.<sup>224</sup> In 1999, consumer optimism faded. In May of that year, the ALI approved the July 1999 draft. In July,

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consumer could not reasonably have expected it, unless it has been expressly agreed to by the consumer. In determining whether a term is part of the contract, the court shall consider the content, language and presentation of the standard form.

Greenfield & Rusch, *supra* note 11, at 127 n.38 (quoting U.C.C. § 2-206 (Sales Draft 1996)).

Scholars debated the merits of the proposed section. Professor Greenfield noted, "Unconscionability is a safety valve that guards against outrageous terms; proposed section 2-206 establishes a more appropriate standard against which to measure whether terms in a standard form document are part of the contract." Michael M. Greenfield, *The Role of Assent in Article 2 and Article 9*, 75 WASH. U. L.Q. 289, 312-13 (1997). Professor White did not support the incorporation of the section. "Because the provision attacks the very mechanism by which parties allocate loss (form contracts), it is unclear how these costs of litigation and of unbargained deals—which will be put on the backs of the honest majority of the consumer class—can be moved elsewhere." White, *supra* note 196, at 356.

Professor Speidel has stated that the Drafting Committee was told by Fred Miller in November 1996 to remove any references to standard terms and standard forms from Committee drafts. Speidel, *supra* note 216, at 615. Efforts to address standard contracts in Article 2 ended in 1999 when the second Drafting Committee was appointed. *Id.*

<sup>223</sup> See Speidel, *supra* note 216, at 617-18 (criticizing industry lobbying); Speidel, *supra* note 221, at 792-93 (same). A number of writers have noted that commercial interests opposed most of the proposals put forward by consumer advocates. See, e.g., Peter A. Alces & David Frisch, *On the UCC Revision Process: A Reply to Dean Scott*, 37 WM. & MARY L. REV. 1217, 1227 n.48 (1996) (citing letters from industry representatives, including the National Retail Federation and the Association of National Advertisers, Inc., urging the committee to maintain the status quo); Greenfield & Rusch, *supra* note 11, at 129 n.42, 132 n.46 (citing letters from General Electric Company and the American Automobile Manufacturers Association in opposition to a provision to deal with standard form contracts); Hillebrand, *supra* note 20, at 76 n.13 (citing letters from commercial interests in opposition to the creation of obligations from sellers to remote purchasers).

<sup>224</sup> See Greenfield & Rusch, *supra* note 11 (outlining the different versions of proposed section 2-206); Swanson, *supra* note 2, at 377-98 (examining committee efforts to redraft section 2-302). Despite these efforts, substantive changes were not made to the section or to its accompanying comments.

As proposals were rewritten, the substantive rights of consumers were usually diluted. See Hillebrand, *supra* note 20, at 101-02 (noting that revisions had weakened proposed requirements to effectively disclaim the implied warranties of merchantability and fitness for a particular purpose).

however, the draft was removed from the agenda for the annual meeting of the NCCUSL. The decision of the NCCUSL leadership to defer action for at least one year was prompted, at least in part, by industry objections to consumer protection provisions<sup>225</sup> contained in the draft, "fueling opposition to other changes of a less controversial nature."<sup>226</sup> The reporter for the Committee, Richard Speidel, and the associate reporter, Linda Rusch, resigned in protest.<sup>227</sup> In August, a new committee was appointed.<sup>228</sup> The second Drafting Committee concluded that revision of Article 2 was unnecessary, choosing instead to propose amendments that were supported by "good reason" and, therefore, not controversial.<sup>229</sup> Thus, efforts to incorporate controversial, special consumer provisions into Article 2 came to an abrupt end.<sup>230</sup> The Committee struggled for several years to develop amendments. The delay in completing amendments was caused by the difficulties that the Committee encountered in quieting opposition to Article 2's scope provision, which enabled

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<sup>225</sup> See Speidel, *supra* note 221, at 792 n.29 ("The pea under the mattress was a new Section 2-206, drafted to particularize the elements of unconscionability . . . Commercial interests opposed all versions of new Section 2-206.").

<sup>226</sup> *Id.* at 792.

<sup>227</sup> See generally Linda J. Rusch, *A History and Perspective of Revised Article 2: A Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999) (discussing revisions made by the first Committee and reasons why consumers failed to achieve their objectives); Speidel, *supra* note 216 (same).

Professor Speidel has observed that "the arbitrary decision to pull the draft before a final vote because of political pressure outside of the drafting process casts a pall over the integrity of private lawmaking and taints the subsequent draft revisions of Article 2." Speidel, *supra* note 221, at 793.

There is disagreement over the merits of the July 1999 Draft. Compare Roy Ryden Anderson, *Of Hidden Agendas, Naked Emperors, and a Few Good Soldiers: The Conference's Breach of Promise . . . Regarding Article 2 Damage Remedies*, 54 SMU L. REV. 795, 795 (2001) (describing the Draft "as a remarkable and valuable contribution to commercial law literature and as an example of the quality of work the National Conference of Commissioners on Uniform State Laws was once capable") with Patricia A. Tauchart, *A Survey of Part 5 of Revised Article 2*, 54 SMU L. REV. 971, 971 (2001) (stating that "the sweeping changes of the July 1999 Draft were not justified").

<sup>228</sup> See *New Drafting Committee Appointed for Revised Articles 2 and 2A*, A.L.I. REP. (Fall 1999), available at [http://www.ali.org/ali/R2201\\_Reporter.htm](http://www.ali.org/ali/R2201_Reporter.htm).

<sup>229</sup> See Anderson, *supra* note 227, at 798 (discussing the decision of the second committee not to make changes without "good reason").

<sup>230</sup> Proposed U.C.C. §§ 2-313A and 2-313B, which both recognize obligations from sellers to remote purchasers, did encounter opposition, but these sections apply to all purchasers and, therefore, are not considered special consumer provisions. See proposed U.C.C. §§ 2-313A, 2-313B.

courts to apply Article 2 to computer information transactions. Finally, the Committee devised a solution that retained the current scope provision but amended the definition of “goods” to exclude “information not associated with goods.”<sup>231</sup>

The amendments approved by the NCCUSL in 2002 and by the ALI in 2003 did not change Article 2’s vision of the marketplace or its essentially neutral position on consumer protection.<sup>232</sup> Without question, proposed sections 2-313A<sup>233</sup> and 2-313B,<sup>234</sup> which recognize obligations from sellers to remote purchasers, will benefit consumers. On the other hand, the proposed amendments did not address standard form contracts or attorneys’ fees and costs for consumers who prevail against sellers. Although proposed section 2-316<sup>235</sup> strengthened the requirements to effectively disclaim the implied warranties of merchantability and fitness for a particular purpose in consumer contracts, it does not meet the concern of consumers that they did not have bargaining power to have disclaimer clauses removed from standard forms.<sup>236</sup> Thus, the decision not to incorporate a provision which deals expressly with form contracts, coupled with the refusal to protect consumers against the use of clauses which disclaim implied warranties and limit remedies for breach of these warranties, provide sufficient evidence that freedom of contract, as defined by current Article 2, has not been redesigned. Accordingly, amended Article 2 continued to insist that, except in extraordinary circumstances,

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<sup>231</sup> U.C.C. § 2-102, which states that Article 2 “applies to transactions in goods,” was not amended. *See* U.C.C. § 2-102 (2003). However, the proposed amendment to U.C.C. § 2-103(1)(k) provides a new definition of “goods.” The proposed definition provides, in part, that the term “goods” did not include information. The term “information” is not defined in either section or its accompanying comments. Yet, the accompanying preliminary comment states that the Article does apply to “smart goods” such as an automobile that contains computer programs, but that it does not apply to an architect’s provision of architectural plans on a computer disk. The proposed comment also provides that if a transaction involved both the sale of goods and the transfer of rights in information, the courts must determine “whether the transaction is entirely within or outside this article, or whether or to what extent this article should be applied to a portion of the transaction.” *See* proposed U.C.C. § 2-103(1)(k) and preliminary comment.

<sup>232</sup> *See* Maggs, *supra* note 25, at 602 (noting that the second committee “decided to add provisions on electronic commerce and rewrite a few troublesome provisions, while leaving most of the article intact”).

<sup>233</sup> *See* proposed U.C.C. § 2-313A.

<sup>234</sup> *See id.* § 2-313B.

<sup>235</sup> *See id.* § 2-316(2)–(3).

<sup>236</sup> *See supra* notes 191–94 and accompanying text.



bargains ought to be enforced as made and to assume that all buyers have the time and financial resources to initiate private litigation to seek redress for their grievances.

The history of the Article 2 uniform law process has been chronicled in numerous scholarly articles.<sup>237</sup> Questions have emerged over whether the approved amendments are even necessary given recent developments in the law which provide resolution to many of the issues identified in the early 1990s.<sup>238</sup> There is no doubt, however, that from the outset of the process, consumers were placed in an unenviable position because of the controversy which surrounds the relative merits of government regulation and freedom of contract. Consumer protection measures are usually experiments and Fred Miller made it clear that experimentation within Code articles was not acceptable.

### *B. The Case against Experimentation*

In 1995, the ALI and the NCCUSL created a subcommittee of the Article 2 Drafting Committee to meet with consumer representatives and commercial interests for the purpose of determining whether consensus could be reached on issues which had generated tension between the two groups.<sup>239</sup> According to Fred Miller, this action was prompted by two concerns. First, the tension between the two groups threatened to impede Committee progress.<sup>240</sup> Secondly, the question of whether consumer measures are necessary to protect the interests of the consumer class continued to trouble some revision participants. Accordingly, consumer concerns "needed better documentation to gain proper recognition and acceptance as real problems. Thus, a period for study and reflection seemed highly desirable."<sup>241</sup> That Miller called for documentation to establish need is not surprising. In 1994, he made the following observation:

One might question whether consumers today are not more sophisticated and better educated (or at least better able to

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<sup>237</sup> See generally Symposium, *Unifying Commercial Law in the 20<sup>th</sup> Century, Understanding the Impulse and Assessing the Effort*, 62 LA. L. REV 991 (2002) (giving the most recent, comprehensive overview of the process).

<sup>238</sup> See generally Maggs, *supra* note 25 (focusing on how electronic commerce has made Article 2 provisions and amendments to these provisions less relevant).

<sup>239</sup> Miller, *supra* note 14, at 199-200.

<sup>240</sup> *Id.* at 200.

<sup>241</sup> *Id.*

acquire representation) and whether business is as predatory as the learning suggests, or whether competition significantly lessens business' ability to impose terms against customer interests. Of course, there always will be an underclass for which the conventional wisdom holds true, but perhaps special regulatory legislation should be adopted for this underclass rather than alter the rules that work reasonably well for others.<sup>242</sup>

In hindsight, the formation of the subcommittee served as a warning that opposition, to at least some consumer protection provisions, could be expected from members of the sponsoring organizations unless evidence established that real problems existed. Need is only one half of the equation to determine wisdom; desirability provides the other half. In 1997, Miller expressed concern that unproven measures could be inefficient, producing unwanted and unintended consequences for the consumer class and for the community as a whole.<sup>243</sup> Incorporation of unproven measures, he declared, was ill advised.<sup>244</sup> Miller's comments left no doubt that experimentation in Code articles was to be avoided and that only proposals supported by data that established need and efficiency would be deemed worthy of consideration by the leadership of the NCCUSL.

The request for research underscores the influence that the debate of the 1970s and 1980s had in defining the issues addressed by the uniform law process. The debate had created a climate of skepticism, which filtered into the academic community, lending credibility to opponents' claims that the consumer class and the community are better served by freedom of contract than by government regulation. The warning issued decades earlier that government regulation in the interests of workers might produce adverse consequences had not been intended to discourage legislative action, but to explain why such action is experimental. Miller resurrected this warning, however, tailoring it to fit the context of consumer protection, and he used it to support the conclusion that experimentation

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<sup>242</sup> Miller, *supra* note 204, at 1565 n.1.

<sup>243</sup> Miller, *supra* note 14, at 210–11, 213, 216.

<sup>244</sup> *Id.* at 213, 216

must be replaced by a methodology which relies upon the gathering of data.<sup>245</sup>

### C. *The Demand for Documentation*

The challenge facing consumers was obvious. The demand that documentation be supplied appeared non-negotiable, but impossible to satisfy. Indeed, Miller conceded that the uniform law process does not provide research to evaluate the expediency of proposals considered by the various drafting committees.<sup>246</sup> The burden of supplying documentation, whether in the form of empirical data or analysis of court decisions, scholarly writings and legislative enactments, fell upon the various interests groups. Some empirical data to establish need, such as the number of consumers who suffer loss in any given situation or transaction, may be impossible to collect, particularly for markets as complex and varied as those governed by Article 2. As Learned Hand had pointed out, the total results of legislation are revealed only over the course of time. Although research, which evaluates judicial decisions, scholarly opinions, and experience under existing legislative enactments may provide some insights into the benefits and burdens of proposed measures, such research is time consuming and expensive to gather. It is also inconclusive. Indeed, much of the research would have exposed controversy, not consensus, over the causes of injustice, the number of consumers who are unable to protect their own best interests, and the wisdom of consumer legislation. The perils of relying upon court decisions, for example, were noted by the first Article 2 Drafting Committee:

A survey reveals relatively few cases under Article 2 where former 2-302 is involved and even fewer cases finding a contract or clause unconscionable. This could mean that there is less unconscionability in the world than one might imagine that strong sellers and buyers have cleaned up their acts. It could also mean that it is difficult for consumers to litigate these issues and that the courts are not getting a steady flow of cases to decide. Given the relatively small size of consumer

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<sup>245</sup> See Miller, *supra* note 204, at 1573 n.34 (stating that commercial law, unlike consumer law, "relies heavily upon freedom of contract and private enforcement without sanctions and promotes the efficiency and benefit of the system as opposed to the interests of a particular class").

<sup>246</sup> Miller, *supra* note 14, at 210.

claims and the absence of provisions in Article 2 for punitive damages, attorney fees and class actions and the growing use of arbitration and mediation, the latter explanation is more probable than the former.<sup>247</sup>

Without question, Miller's request for research created an obstacle for consumer advocates.<sup>248</sup> There were other obstacles as well. Thus, it is impossible to determine the degree to which each contributed to the decision of the sponsoring organizations that Article 2 should continue to insist that, except in extraordinary circumstances, freedom of contract maximizes utilities and promotes the efficient allocation of resources. Demands for data have been made in the past.<sup>249</sup> Not everyone agrees, however, that such demands accomplish their intended objectives. Professor Duncan Kennedy observed:

Why is it that the patent manipulability of efficiency arguments does not impair their attractiveness, while distributive and paternalist arguments, which are actually easier to grasp and to apply, seem excessively fuzzy?

At least part of the answer, I think, is that the move to efficiency transposes a conflict between groups in a civil society from the level of a dispute about justice and truth to a dispute about *facts*—about probably unknowable social science data that no one will ever actually try to collect but which provides ample room for fanciful hypotheses.

Such a transposition from one level to another makes everyone, just about, feel better about the dispute. The move from a conflict of interests or consciousnesses to a conflict about facts makes it seem—quite falsely—that the whole thing is less intense and less explosive. That it is *imaginable* that someone

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<sup>247</sup> Greenfield & Rusch, *supra* note 11, at 137–38 (quoting U.C.C. § 2-105 n.3 (Sales Draft 1998)).

<sup>248</sup> A number of writers, including some revision participants, have noted the lack of reliable empirical evidence to establish the wisdom of proposed consumer measures. See, e.g., Greenfield & Rusch, *supra* note 11 at 144; Hillebrand, *supra* note 220, at 636; Hillman, *supra* note 22, at 1517 (stating that empirical studies “are particularly problematic with respect to Article 2 because of the variety of contexts and transactions it governs”); Miller, *supra* note 14, at 197 n.57 (acknowledging that empirical data is “remarkably hard to come by and often inconclusive”); Rasmussen, *supra* note 150, at 1119 (“What benefits consumers . . . is far from clear. There is no mechanism that ensures that consumer groups lobby for positions that, in the long run, increase consumer well-being.”); Speidel, *supra* note 215, at 609 (observing that the committee was often “shooting in the dark.”).

<sup>249</sup> See, e.g., Hillman, *supra* note 22, at 1517–18; Rubin, *supra* note 175, at 299–306.

could one day actually produce the factual data makes it seem irrelevant that no one is practically engaged in that task, or ever will be.<sup>250</sup>

It is a matter of pure speculation whether Miller's strategy reduced the tension between consumer advocates and skeptics. Consumers might not be so charitable. It is but a corollary that inaction is preferable to action and that the status quo should be maintained unless empirical research establishes that consumers as a class are in need and that the consequences of proposed measures are accommodating, not detrimental, to the economic welfare of groups and the community at large. Given that production of such data was unlikely, Miller's request served no other purpose than to block the incorporation of measures that had triggered controversy and threatened uniform enactment. This charge simply begs the question and plunges the discussion into a debate over the merits of experimentation. The future does not look promising for consumers who lobby Congress and state legislatures for reform measures to supplement Article 2's provisions. They may discover that legislators have been persuaded by skeptics, educated by the uniform law process, to take action only when evidence beyond the mere testimony of aggrieved witnesses is put forward to support the wisdom of consumer laws.

### CONCLUSION

The roots of the debate over the wisdom of protection laws are found in nineteenth century classical contract theory and its vision of the marketplace where individual and community welfare are in perfect harmony. Market realities reveal that contract practices deviate from the ideal, prompting scholars to question whether these deviations create a market climate that fosters economic abuse and whether regulatory laws achieve an appropriate balance between contract objectives. The labor movement provided the outline for the debate; the consumer movement identified the details.

The conclusion that contract law has reached a crossroads is inescapable. Consensus over which road the law should take, though, is lacking. Unfortunately, the uniform law process fueled the controversy over the benefits and burdens of

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<sup>250</sup> Kennedy, *supra* note 197, at 603.

government regulation and, as a consequence, failed to provide a sense of direction. Almost a century ago, Learned Hand asked the question whether we are better off with regulation than without it. The question is as important today as it was in 1908. Despite the passing of time, the enactment of multiple consumer protection laws, and the publication of scores of scholarly writings, the question has yet to be answered.

